SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 19

BAXTER N. FOUST, ADMINISTRATOR, ETC., PETITIONER,

vs.

MUNSON STEAMSHIP LINES, DEBTOR IN REORGANIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX.

	Original	Print
Record from D. C. U. S., Southern New York	1	1
Statement	1	1
Complaint	2	2
Answer of defendant	8	6
Petition of Munson Steamship Line for reorganization.	10	7
Order approving filing of petition and restraining order.	20	13
Notice of motion for modification of restraining order..	30	20
Affidavit of Roy H. Caldwell	32	21
Affidavit of Alfred N. Heuston, in opposition to motion to modify restraining order	36	23
Order in Orlan Moore matter denying motion to modify restraining order	38	24
Order denying motion to modify restraining order	40	25
Notice of appeal	43	26
Motion in District Court for leave to appeal, and order allowing appeal	44	27
Assignments of error	47	28
Citation on appeal.....(omitted in printing)..	49	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPT. 10, 1936.

.—8183-C

	Original	Print
Record from D. C. U. S., Southern New York—Continued.		
Notice of motion for order granting leave to appeal	50	29
Petition in U. S. C. C. A. for leave to appeal	52	30
Affidavit of Irving L. Evans, in opposition to motion for leave to appeal	60	35
Opinion, per curiam, granting leave to appeal	63	37
Order granting leave to appeal	64	38
Motion for leave to file supplemental assignments of error	65	38
Affidavit of Simone N. Gazan, in support of motion	67	39
Affidavit of Alfred N. Heuston, in opposition to motion for leave to file supplemental assignments of error	70	41
Order allowing supplemental assignments of error	72	43
Supplemental assignments of error	73	43
Stipulation as to record	75	44
Clerk's certificate (omitted in printing)	76	
Proceedings in U. S. C. C. A., Second Circuit	78	47
Opinion, Hand, J.	78	47
Order on opinion	81	52
Opinion, per curiam, on further hearing	83	53
Decree	84	54
Clerk's certificate	86	54
Order allowing certiorari	87	55

[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of MUNSON STEAMSHIP LINE, Debtor;

BAXTER N. FOUST, as Administrator of Coy E. Foust, Deceased, Appellant

STATEMENT

1934

Feb. 1. Summons and complaint filed.
Feb. 7. Answer of defendant filed.
June 11. Petition of Munson Steamship Line for reorganization under Section 77b filed.
July 13. Adjudication of insolvency; restraining order granted and appointment of trustees filed.

1935

Jan. 26. Notice of motion to modify restraining order to permit Foust, administrator, to prosecute suit filed.
Jan. 31. Opinion denying motion to modify restraining order filed.
Mar. 26. Order denying motion to vacate stay filed.
Apr. 5. Petition of Foust, administrator, for leave to appeal allowed and filed.
Apr. 5. Citation on appeal issued and filed.
Apr. 9. Bond on appeal approved and filed.
Apr. 15. Application to Circuit Court of Appeals for leave to appeal filed.
Apr. 29. Opinion granting leave to appeal filed.
May 6. Order of Circuit Court of Appeals allowing appeal filed.
May 8. Consent and order extending time of appellant to procure settlement of record on appeal to June 10, 1935.
May 13. Application to Circuit Court of Appeals for leave to file supplemental assignments of error filed.
May 21. Order allowing filing of supplemental assignments of error filed.
May 22. Supplemental assignments of error filed.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BAXTER N. FOUST, as Administrator of Coy E. Foust, Deceased, Plaintiff,

against

MUNSON STEAMSHIP LINE, Defendant

COMPLAINT

Plaintiff brings this suit against the defendant at common law under the Jones Act of Congress for the benefit of the surviving father of decedent, as next of kin, and alleges:

I

That on December 30th, 1933, Baxter N. Foust was duly appointed administrator of the goods, credits and chattels which were of Coy E. Foust, deceased, by the Superior Court of Rowan County, State of North Carolina, and that the said Baxter N. Foust duly qualified as such administrator and is now the personal representative of said estate.

II

That at all times hereinafter mentioned the Munson Steamship Line was, and is, a domestic corporation organized and existing under the laws of the State of New York, and having an office and principal place of business in the City, County and State of New York, and within the jurisdiction of this Court.

[fol. 3]

III

That at all times hereinafter mentioned the said defendant owned the merchant steamship "Mundelta".

IV

That at all times hereinafter mentioned the said defendant operated the merchant steamship "Mundelta".

V

That at all times hereinafter mentioned the said defendant manned, equipped and supplied the merchant steamship "Mundelta".

VI

That on February 20, 1932, Coy E. Foust was employed by the said defendant as an ordinary seaman on said steamship "Mundelta".

VII

That on February 20, 1932, said Coy E. Foust was thirty-six years of age, had a life expectancy of 31.07 years and was earning about $47.50 per month and his keep.

VIII

That said Coy E. Foust received fatal injuries on board said steamship "Mundelta" on February 20th, 1932, as hereinafter detailed, at which time said Coy E. Foust was single and unmarried and left as his sole surviving next [fol. 4] of kin his father, Baxter N. Foust, who received contributions and had an expectation of support from his said son, who needed, and now needs, such support. That said father was sixty-six years of age at the time of his son's death, and had a life expectancy of 10.54 years.

IX

That on or about February 20th, 1932, the said steamship "Mundelta" lay at the dock of the Bangor & Aroostook Railroad Company at Searsport, Maine. The top hatches of #1 and #2 holds were on but the 'tween deck hatches of said holds were off or partly off. There was no sufficient light in 'tween decks, either natural or artificial, at the time of the accident hereinafter described, and particularly at said open 'tween deck hatches, nor were there any life lines, guards or rails about said open 'tween deck hatches, nor was there any sign or warning of the open hatch or the danger, or any light to indicate the absent hatch covers.

X

Plaintiff alleges that the said 'tween deck hatch #1 and #2 were not then receiving or discharging cargo; that the top hatches were covered.

XI

Plaintiff alleges that about 8:00 A. M. on the morning of [fol. 5] February 20, 1932, the said Coy E. Foust was at

work in said 'tween decks engaged in the performance of his duties in sweeping or cleaning certain dirt from said 'tween decks at, near or about said hatchways when, on account of the darkness, the absence of rails, the want of warnings, in default of any protection of said opening, the said Coy E. Foust in moving about to perform his duties stepped, walked or fell into said 'tween deck hatch #1 and was precipitated into the lower hold.

XII

That in so falling the said Coy E. Foust sustained fatal injuries and after lingering in conscious pain and suffering until about 8:00 P. M. the same day, died.

XIII

Plaintiff alleges that the death of said Coy E. Foust was proximately caused by the negligence of the defendant, its servants, agents and employees as follows:

a. In not providing said decedent with a reasonably safe place of work.

b. In not having life lines, guards or rails about said open hatch.

c. In not having adequate light about said open hatch.

d. In not having a warning sign of "Open Hatch, D-A-N-[fol. 6] G-E-R", or similar wording, properly illuminated at or near said hatch, as required by custom and as dictated by reasonable prudence.

e. In permitting some of the 'tween deck hatch covers to be and remain off when no work was being done, without protecting such openings.

f. In permitting the top deck hatch to be and remain covered, thereby excluding daylight from entering the 'tween decks.

g. In not furnishing adequate artificial light in 'tween decks about #1 and #2 hatches while said decedent was engaged in work.

h. In ordering said decedent to do and perform work at or near said open 'tween deck hatch when the same was unlighted and unprotected as hereinbefore detailed.

i. In not notifying or warning said decedent of the defects and dangers in and about said 'tween deck hatch.

XIV

Plaintiff sues to recover indemnity for the death of said Coy E. Foust and also damages for his conscious pain and suffering, all for the use and benefit of said decedent's father, Baxter N. Foust, his sole surviving next of kin, his mother having predeceased him, said indemnity and damages amounting to Fifteen Thousand ($15,000) Dollars.

[fol. 7] Count Two

XV

Plaintiff realleges hereunder all the allegations in paragraphs 1 to 10, inclusive, and also from 12 to 14, inclusive, as fully as if herein set forth in extenso.

XVI

Plaintiff alleges that about 8:00 A. M. on the morning of February 20th, 1932, the said Coy E. Foust was at work in said 'tween decks engaged in the performance of his duties in sweeping or cleaning certain dirt from said 'tween decks at, near or about said hatchways when, on account of the darkness, the absence of rails, the want of warnings, in default of any protection of said opening, the said Coy E. Foust in moving about to perform his duties stepped, walked or fell into said 'tween deck hatch #2 and was precipitated into the lower hold.

XVII

Wherefore, plaintiff demands judgment against the defendant in the sum of Fifteen Thousand ($15,000.00) Dollars, together with all costs and disbursements of the action.

Gazan & Caldwell, Attorneys for Plaintiff, One Broadway, Borough of Manhattan, City of New York.

[fol. 8] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF DEFENDANT.

Defendant, by its attorneys, Tompkins, Boal & Tompkins, answering the complaint herein, alleges upon information and belief:

As to Count One:

First. It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered "I", "VII", "VIII" and "XIV" of the complaint.

Second. It denies each and every allegation contained in paragraphs numbered "IX", "X", "XI", "XII" and "XIII" of the complaint.

As to Count Two:

Third. It repeats and realleges each and every allegation [fol. 9] hereinbefore alleged with the same force and effect as though herein repeated at length.

Fourth. It denies each and every allegation contained in paragraph "XVI" of the complaint.

Further Answering, Defendant Alleges:

Fifth. That plaintiff's intestate's employment had certain risks incident thereto, which were obvious and well known to the plaintiff's intestate at all the times of his employment and also when he first entered thereon, and that said risks were assumed by plaintiff's intestate, and that whatever injuries and illnesses plaintiff's intestate received in said employment and which are complained of by him herein, arose from and were caused by said risks, all of which were taken and assumed by plaintiff's intestate at the time he entered upon said employment and during the continuance thereof.

Further Answering, Defendant Alleges:

Sixth. That any injuries sustained or suffered by plaintiff's intestate at the time and place and/or on the occasion

mentioned in the complaint were caused in whole or in part, or were contributed to, by the negligence or fault or want of care of the plaintiff's intestate, and not by any negligence or fault or want of care on the part of this defendant. [fol. 10] Wherefore, defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

Tompkins, Boal & Tompkins, Attorneys for Defendant, Office & P. O. Address, 116 John Street, Borough of Manhattan, City of New York.

In United States District Court, Southern District of New York

No. 59,923

In Proceedings for Reorganization of a Corporation

In the Matter of Munson Steamship Line, Debtor

Petition of Munson Steamship Line for Reorganization

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The petition of Munson Steamship Line, a corporation organized and existing under the laws of the State of New [fol. 11] York (hereinafter referred to as the Debtor"), under Section 77B of an act entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States", approved July 1, 1898, and acts amendatory thereof and supplementary thereto (hereinafter referred to as the "Bankruptcy Act"), respectfully shows:

First. That the debtor is a corporation duly organized and existing under the laws of the State of New York, and a citizen and resident of said State, and is a commercial corporation and is not a municipal, railroad, insurance or banking corporation, or a building and loan association; that during the six months' period immediately preceding the filing of this petition and for many years prior thereto the debtor has had, and now has its principal place of business and also its principal executive and operating offices in

the Borough of Manhattan, in the City of New York, New York, in the Southern District of New York.

Second. That the nature of the business of the debtor is the ownership and operation of freight and passenger ships in foreign and coastwise trade, together with auxiliary enterprises such as wharves, warehouses, towboats, lighters, etc. These activities are carried on either directly or through subsidiaries. In addition, through subsidiaries, also the debtor owns improved real estate in New York City, and hotel and allied properties in Nassau, Bahamas. The debtor owns and/or operates the following freight and/or passen-
[fol. 12] ger ships: Munalbro, Mundelta, Munplace, Munsomo, Walter D. Munson, Muncove, Munmotor, Munrio, Munizla, Munloyal, Munorleans, Munlisto, Southern Cross, American Legion, Pan America, Western World, Muntropic, Muneric, Munardan, Rajah, Mundolphin, Mundixie, Munbeaver and Munmystic, and controls through stock ownership the fol-owing subsidiary companies: Munson Building Corporation, Bahamas Hotel Company, Limited, Munaires Steamship Corporation, Munindies Steamship Corporation. Munalbro Steamship Corporation, Mundelta Steamship Corporation, Munisla Steamship Corporation, Munplace Steamship Corporation, Munrio Steamship Corporation, Munsomo Steamship Corporation, Munargo Steamship Corporation, Caibarien Transport Company, Crossburn Steamship Company, Ltd., Munorway Steamship Corporation, Bahamas Golf Course, Limited, Hotel Nassau Company, Limited, The New Colonial and Saratoga Transportation Company, Limited, Compania Maritima Cubana, Munson Inland Water Lines, Inc., and 67 Wall Street Restaurant Corporation. Additional ships are owned by various of the aforesaid subsidiary companies.

Third. A brief description of the assets, liabilities, capital stock and financial condition of the debtor is as follows:

The assets, liabilties and capital stock of the debtor are set forth in the tentative and preliminary balance sheet of the debtor as of March 31, 1934 (being the latest available balance sheet), attached hereto as Exhibit "A" and made [fol. 13] a part hereof. No changes in the debtor's condition have occurred since that date other than through the usual course of business, except as herein set forth.

As shown by the balance sheet aforesaid, the assets of the debtor consist of: (1) Steamers, wharves, warehouses,

etc., less reserve for depreciation, $6,942,242.44; (2) investments in subsidiary and affiliated companies, $8,628,326.64; (3) good-will and other intangibles, $557,751.00; (4) deferred charges, $345,490.80; (5) cash on hand and in banks, $65,883.26; (6) receivables, less reserve for doubtful accounts, $701,471.00; (7) stores and supplies, $260,936.06; (8) prepaid insurance, $329,613.74; (9) securities and miscellaneous investments, less reserve, $164,791.43; (10) interest in default on bonds and deficit, $565,274.55; or a grand total of $18,561,780.92.

Similarly, the liabilities of the debtor consist of: (1) notes, drafts, accounts and vouchers payable, $2,934,503.54; (2) due to subsidiary and affiliated companies, $807,636.80; (3) prepaid Passage Collections, $88,934.35; (4) accrued interest in default on bonds, $274,905.00; (5) reserves, $839,745.38; (6) deferred credits, etc., $96,629.80; (7) long term notes payable, $2,956,789.56; (8) bonded indebtedness, $6,852,500.00; (9) capital stock, $3,555,500.00; (10) excess of revenues over expense, open voyage accounts, $154,636.49; or a grand total of $18,561,780.92.

Although said balance sheet, Exhibit "A", shows cash on hand and in banks as of March 31, 1934, in the amount of $65,883.26, that amount has been largely depleted since that date so that the cash now on hand and in banks amounts to not more than $10,000.

[fol. 14] The capital stock of the debtor, issued and outstanding, consists of 11,045 shares of 6% Cumulative Preferred Stock of the par value of $100 per share, carried on the balance sheet at $1,104,500, and 125,100 shares of common stock, without par value, carried on the balance sheet at $2,451,000.

The debtor's financial condition is as follows:

(1) The debtor is indebted to the United States Government under four First Preferred Ship Mortgages aggregating $2,565,000, of which a principal amount of $820,800 is now past due.

(2) The debtor is indebted to divers and sundry persons holding its 6% Secured Gold Bonds issued and now outstanding in the aggregate principal amount of $4,354,000 under its Mortgage and Deed of Trust to Guaranty Trust Company of New York, (successor trustee) dated as of January 1, 1929. The debtor defaulted in the payment of the instalment of interest aggregating $130,620.00 which be-

came due on said bonds on January 1, 1934, and such default continued for a period of thirty days and still continues, under which circumstances the trustee may, and upon request of the requisite percentage of bondholders must, declare the principal of the outstanding bonds to be due and take appropriate proceedings under said Mortgage and Deed of Trust to foreclose its lien and enforce payment of said bonds. Any holder of coupons is now entitled to sue the debtor for recovery of the amount of such coupons.

[fol. 15] (3) The debtor is indebted to divers and sundry persons holding its 6½% Gold Debenture Bonds issued and now outstanding in the aggregate principal amount of $2,430,000 under its Indenture to City Bank Farmers Trust Company (successor trustee) dated as of January 1, 1929. The debtor defaulted in the payment of the instalment of interest aggregating $79,975.00, which became due on said Debentures on April 1, 1934, and such default continued for a period of thirty days and still continues, under which circumstances the trustee may, and upon request of the requisite percentage of debenture holders must, declare the principal of the outstanding debentures to be due and take appropriate proceedings under said Indenture to enforce their payment. Any holder of coupons is now entitled to sue the debtor for recovery of the amount of such coupons.

(4) The debtor is indebted to divers and sundry persons on the other obligations and notes and accounts payable aggregating upwards of $3,000,000.00 a substantial amount of which is now past due.

By reason of the continuing depression in the Shipping Industry the consolidated gross earnings of the shipping business of the debtor have declined from $22,963,412 in the fiscal year ended June 30, 1929, to $8,380,390 in the fiscal year ended June 30, 1933. Although far-reaching and rigid economies have been put into effect by the debtor during the past two years which have resulted in a drastic reduc-[fol. 16] tion in operating expenses, they have not been sufficient to solve the financial problems of the debtor. The debtor is without funds to pay all or any substantial part of the amounts set forth above as owing by it, and on information and belief alleges that it had and now has no means of borrowing or otherwise procuring such funds.

Fourth. That there is pending in the New York Supreme Court in Kings County a proceeding by G. & B. Marine Repair Company against the debtor, in which the G. & B. Marine Repair Company, alleged to be a creditor of the debtor, sets forth allegations as to the manner in which the debtor conducts its business and affairs, alleges that the fair value of the assets of the debtor is largely in excess of its indebtedness but that it is unable to obtain sufficient funds to meet its current liabilities, and prays for the appointment of a receiver or receivers by the Court, with the usual powers of receivers in such cases, to preserve the properties and business of the debtor for the benefit of all its creditors and stockholders, and to order a sale of its property and the administration of the proceeds of such sale for a like purpose. This proceeding was commenced on November 29, 1933, but the time to answer the complaint has been extended from time to time by stipulation and no answer has yet been filed.

Fifth. That by reason of the matters and things heretofore alleged, certain of the creditors of the debtor have [fol. 17] brought suit against the debtor on their claims, and other creditors of the debtor are pressing their claims for payment and the debtor apprehends that they will forthwith bring suit thereon and libel or attach the vessels and other property of the debtor, enter thereon and place a marshal, sheriff or other officer in possession thereof, and in divers other manners enforce their respective claims. Such action on the part of such creditors will, as the debtor believes, result in judgments, libels, executions and seizures by marshals, sheriffs and other like officers and in forced sales of the property of the debtor, with the necessary consequence that the debtor will be compelled to cease the conduct of its business. Any such action on the part of such creditors will interfere with and obstruct the business of the debtor, will cause the suspension of such business and will cause great and irreparable injury and loss to the debtor and to all of its creditors.

The debtor's business consists for the most part in the ownership and operation of a fleet of freight and/or passenger vessels in foreign and coastwise trade. Its four largest vessels are operated between New York and Buenos Aires and the debtor has a contract, expiring August 1, 1938, with the United States Government to carry United States mails

on such route. Unless the properties of the debtor are continued in operation and maintained in good order, such properties will greatly depreciate in value and must necessarily be sold at much less than the actual market value thereof and the debtor and its creditors will suffer heavy losses as a result thereof. Should any of the creditors of [fol. 18] the debtor succeed in enforcing their claims and thereby compel the debtor to suspend its business and become inactive, irreparable injury, damage and loss will be sustained by all creditors of the debtor.

That on information and belief, while the property, assets and business of the debtor are of great value as a going concern, and at a fair valuation exceed the amount of the debtor's indebtedness as aforesaid, if said business should cease and said property and assets should be sold or disposed of at forced sale they would not bring their true value and might prove to be insufficient to provide in full for the payment of the indebtedness of the debtor. If said properties and assets be dismembered by separate sales under execution, or if they cease to be operated or fall into disuse and become out of repair, or if the skilled executive, technical, manufacturing and selling organizations of the debtor be disrupted and scattered, or if its mail contract be lost, or if its valuable good will be not preserved by continuing its business, the creditors of the debtor and its stockholders will thereby suffer irreparable injury, damage and loss.

The only way the relative priorities and positions of the creditors and stockholders of the debtor can be preserved is through the continuance of the business of the debtor under a plan of reorganization, equitable and fair to all interests, to be made effective with the aid and under the supervision of this Court. That by reason of the foregoing it is essential for the protection of the rights and interest of the creditors and stockholders of the debtor that the debtor be afforded relief under Section 77B of the Bankruptcy Act.

[fol. 19] Sixth. That the debtor is unable to meet its debts as they mature and that it desires to effect a plan of reorganization pursuant to Section 77B of Chapter VIII of the Acts of Congress relating to bankruptcy.

Seventh. That the filing of this petition was duly authorized by the debtor by resolution of the Board of Di-

rectors of the debtor adopted at a meeting thereof duly held on the 21st day of May, 1934, as shown by the certificate of the President of the debtor attached hereto and made a part hereof as Exhibit "B".

Wherefore, your petitioner prays that an order may be entered approving this petition as properly filed, under said Section 77B, and that it be granted all other and further relief to which it may be entitled.

Munson Steamship Line, by Frank C. Munson, President. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Debtor, 15 Broad Street, New York, N. Y.

(Verification and Exhibits A and B, attached to petition, are omitted from this record as surplusage.)

[fol. 20] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 59,923

[Title omitted]

ORDER APPROVING FILING OF PETITION AND RESTRAINING ORDER

This cause coming on to be heard at this time on the petition herein and the court having heard the arguments of counsel and the views of creditors and being fully advised in the premises, and being satisfied that such petition complies with Section 77B of Chapter VIII of the Acts of Congress relating to bankruptcy and has been filed in good faith, it is

Ordered, adjudged and decreed:

1. That said petition be and it hereby is approved as properly filed under Section 77B of Chapter VIII of the Acts of Congress relating to bankruptcy.

[fol. 21] 2. That the debtor is unable to meet its debts as they mature.

3. That by reason of the facts set forth in said petition, the debtor requires relief under said Section 77B and has

no adequate remedy save through the granting of such relief, and that it is necessary that trustees of the debtor's assets, properties and business be appointed.

4. That Edward P. Farley, Esq., and Morton L. Fearey, Esq., be and they are hereby appointed temporarily trustees of all and singular the assets, properties, lands, estates, rights and franchises, of whatever kind, character and description whatsoever and wheresoever situated, of the debtor. The said trustees shall have the same powers as those exercised by a receiver in equity to the extent consistent with the provisions of Section 77B of Chapter VIII of the Acts of Congress relating to bankruptcy.

5. That the trustees appointed herein be and hereby are authorized and directed, pending further order of this Court in the premises, to run, manage, maintain, operate and keep in proper condition and repair the assets, properties and business of the debtor, wherever situated, whether in this State, judicial circuit, and whether in the United States of America or elsewhere, and to manage, operate and conduct its business, and to this end to exercise its authority and franchises and discharge all duties obligatory upon it, and to employ and dicharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees; to collect and receive the [fol. 22] income, rents, revenues, tolls, issues and profits of said assets, properties and business; to collect all outstanding accounts and all dividends and interests on securities belonging to it, to aid and assist its subsidiary corporation as may be necessary to protect the debtor's interest therein, to continue, until further order of this Court, the existing purchasing, selling, operating, business and financial agreements, arrangements and relations of the debtor with its subsidiary companies and with the United States of America to the extent that they may be necessary or advisable in order that the properties of the debtor and its subsidiary companies may be operated as nearly as may be with the same policy of management, all in the same manner that it would be entitled and bound to do in its own right, and, to the extent necessary, to protect and preserve the assets, properties and business of the debtor, all according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein.

6. That within three (3) days from and after the entry of this order, said trustees shall each execute and file with the Clerk of this Court a joint bond with one or more solvent sureties approved by the Clerk of this Court, for the benefit of whom it may concern, in the sum of $50,000, conditioned to the effect that they will well and truly perform the duties of their office, and duly and faithfully account for all moneys and properties whatsoever which may come into their hands and abide by and perform all things which they shall be directed by the Court to do.

[fol. 23] 7. That all persons, firms and corporations having in their possession any of the property of the debtor are hereby ordered to deliver the same to the trustees appointed herein and to make such transfers, assignments and conveyances in connection therewith as may be necessary and proper; and each and every of the officers, directors, agents and employees of the debtor is hereby required to turn over and deliver to said trustees, or their duly constituted representatives, any and all books of account, vouchers, papers, deeds, contracts, notes, securities, accounts, moneys or other property in his or their hands, or under his or their control belonging to or in the possession of the debtor, and to abide by and conform to such orders not inconsistent with the provisions of Section 77B of Chapter VIII of the Act of Congress relating to bankruptcy as may be given from time to time by said trustees or their duly constituted representatives, in conducting the operation of the assets, properties and business of the debtor and in the discharge of their duties as trustees.

8. That the trustees so appointed shall, within ten days of the entry of this order, cause a notice to be mailed to each known creditor of the debtor at his last known post office address; to Guaranty Trust Company of New York, 140 Broadway, New York City, trustee of the debtor's mortgage and deed of trust dated as of January 1, 1929; to City Bank Farmers Trust Company, 22 William Street, New York City, trustee of the debtor's indenture dated as of January 1, 1929, and to the stockholders of the debtor as the same may appear on the books of the debtor, and to [fol. 24] cause publication of such notice to be made at least once a week for two successive weeks in a newspaper published and having a general circulation in the City of New York, New York, that a hearing will be held herein be-

fore this Court in Room 3, twelfth floor of the Woolworth Building, 233 Broadway, New York City, on the 28th day of June, 1934, at 4:30 o'clock in the afternoon, daylight saving time, to determine whether such appointment of said trustees shall be made permanent or shall be terminated and the debtor restored to possession, or whether such trustees be removed and the debtor continue in possession, or whether a substitute trustee or trustees or an additional trustee or trustees shall be appointed by the Court.

9. That the trustees are authorized in their discretion from time to time until further order of this Court, out of funds now or hereafter coming into their hands to pay:

(a) All necessary current expenses of the debtor in operating the assets and properties and conducting the business of the debtor, including among other expenses the wages, salaries and compensation of all officers, attorneys, counsel, managers, superintendents, agents or employees retained by the debtor;

(b) Pending further orders of this Court in the premises, the trustees hereby are authorized to pay pay checks and like instruments issued to employees for services rendered to the debtor, whenever the same are presented for payment;

[fol. 25] (c) The costs of maintaining the corporate existence of the debtor, including the necessary expenses of the preservation of the records and the registration and transfer of its stocks and bonds and trustees, charges under indentures under which securities of the debtor have been issued;

(d) The expense of printing pleadings, motions, petitions and orders now on file or hereafter filed in this case, which are reasonably necessary to be printed, in such quantity as shall provide copies for the use of the Court, the trustees, the debtor, parties to the cause, and such others as may have a substantial interest therein; such expense to be taxed as costs in this case.

Until the trustees appointed herein shall have qualified the officers of the debtor are hereby authorized to continue to sign checks drawn on any Bank-accounts of the debtor.

10. That the trustees shall be allowed until September 1, 1934 (unless the time be extended further by order of this Court), within which to report to the Court as to the advisability of rejecting any contract of the debtor, executory in whole or in part, and continued operation by the trustees under any of said contracts, within said period allowed for such report and until the entry of an order directing such rejection, shall not be deemed to conclude the Court or the trustees in respect to such election, or to constitute an election.

[fol. 26] 11. That pending further order of the Court in the premises the trustees are authorized and empowered to institute or prosecute in any court, or before any tribunal of competent jurisdiction, all such suits and proceedings as may be necessary, in their judgment, for the recovery or proper protection of the properties or rights of the debtor, and to make settlement of any thereof and likewise to defend any actions, claims, proceedings, or suits now pending against the debtor, or which may hereafter be asserted, or to be brought in any court or before any officer, department, commission or tribunal, to which the trustees or debtor are or shall be a party, but no payment shall be made by the trustees in respect of any such claims, actions, proceedings or suits; and no action taken by the trustees in defense or settlement of such claims, actions, proceedings or suits shall have the effect of establishing any claim upon or right in the properties or funds in the possession of the trustees, that otherwise would not exist.

12. The trustees shall close the present books of account of the debtor as of midnight June 13, 1934. The trustees shall open new books of account as of 12:01 o'clock A. M. June 14, 1934, and cause to be kept therein due and proper accounts of their earnings, expenses, receipts and disbursements as such trustees, and shall preserve proper vouchers for all payments made on account thereof, and deposit the moneys coming into their hands in any of the banks in which funds of the debtor are presently deposited, and/or in such other banks as shall be selected and approved by this Court.

[fol. 27] 13. That, not later than September 1, 1934, the trustees shall file with the Clerk of this Court a statement

of the assets and liabilities of the debtor as of midnight March 31, 1934, and within ninety days after the close of each quarter year thereafter shall file with said Clerk a statement of the assets and liabilities of the debtor as of the close of business on the last day of the preceding quarter year, together with a summary statement of the revenues and expenses of the debtor for the preceding quarter year.

14. That the debtor, its stockholders, directors, officers, agents, attorneys, servants and employees, and all other persons, firms and corporations, including the sheriffs and marshals and their officers, agents, attorneys, representatives, servants and employees whether creditors or claiming to be creditors or having or claiming to have any right, title or interest of, in or to any property or properties of the debtor, be and they hereby are enjoined and restrained from interfering with, attaching, garnisheeing, levying upon or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, moneys, properties and premises belonging to or in the possession of the debtor or of the trustees, or from taking possession of or in any way interfering with the same, or any part thereof, or from interfering in any manner to prevent the discharge by the trustees of their duties and obligations in the maintenance and operation of said assets, properties and business under the orders of this Court, or from instituting or prosecuting or continuing the prosecution of any [fol. 28] action at law or action or proceeding in equity or admiralty or bankruptcy against the debtor or the trustees in any court of law or equity or admiralty or bankruptcy or before any association, organization, commission, board, referee or other court or tribunal, or otherwise, and all persons, parties, firms and corporations, including the debtor, and their representatives, agents, attorneys and servants, and all sheriffs, marshals, and their officers and their deputies, representatives and servants, are hereby enjoined and restrained from selling, removing, transferring, disposing of or attempting in any way to sell, remove, transfer or dispose of or in any way to interfere with any properties, assets or effects in the possession of the debtor or of the trustees or owned by the detbor or the trustees and in the possession of any officers, agents, attorneys or

representatives of the debtor or of the trustees or of any other person, party, firm or corporation, and from doing any act whatsoever to interfere with the possession and management by the trustees of the assets, properties and business of the debtor, or in any way to interfere with the trustees in the discharge of their duties or to interfere in any way with the administration and disposition in this proceeding of the affairs and properties of the debtor and of the trustees. Provided, however, that the Court may, upon notice and for cause shown, permit any judicial proceeding to enforce any lien upon the estate of the debtor.

15. This Court reserves full right and jurisdiction to make from time to time such orders as the Court shall deem proper, fixing the time within which any plan of re- [fol. 29] organization shall be proposed, accepted and confirmed, requiring the debtor or the trustees to file such schedules and submit such information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan, determining a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and after which no such claim or interest may participate in any plan, except on order for cause shown, the manner in which such claims and interests may be filed or evidenced and allowed and, for the purposes of any proposed plan and its acceptance, the division of creditors and stockholders into classes according to the nature of their respective claims and interests, and in general such orders amplifying, extending, limiting or otherwise modifying this order as to the Court may at any time seem proper.

Alfred C. Coxe, U. S. D. J.

Dated June 13, 1934.

I hereby certify that the bond required by the foregoing order has been approved and filed.

Charles Weiser, Clerk. (Seal of the United States District Court for the Southern District of New York.)

[fol. 30] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 59,923

[Title omitted]

NOTICE OF MOTION FOR MODIFICATION OF RESTRAINING ORDER

SIRS:

Please Take Notice that upon the annexed affidavit of Roy H. Caldwell, sworn to on the 25th day of January, 1935, and on all the proceedings heretofore had in the above entitled matter as well as on all the proceedings and pleadings heretofore had in the case of Baxter N. Foust, as administrator of Coy E. Foust, deceased, v. Munson Steamship Line, now pending in the United States District Court for the Southern District of New York, the undersigned will move this Court at a stated term thereof for the hearing of motions to be heard at the United States District Court, Southern District of New York, Old Post [fol. 31] Office Building, in the City of New York, on the 30th day of January, 1935, at 10:30 in the forenoon, or as soon thereafter as counsel can be heard, for an order modifying the order signed by Hon. Alfred C. Coxe, United States District Judge, in the above captioned matter, on the 13th day of June, 1934, in that the aforesaid order be modified to permit Baxter N. Foust, as administrator of Coy E. Foust, deceased, above named, to proceed to prosecute his claim against the Munson Steamship Line to a final award and/or final awards against Edward P. Farley, Esq., and Morton L. Fearey, Esq., trustees for Munson Steamship Line and for such other, further and different relief as may be just and proper.

Dated January 25th, 1935.

Yours, etc., Gazan & Caldwell, Attorneys for Claimant, 1 Broadway, New York City.

To Tompkins, Boal & Tompkins, Esqs., Attorneys for Munson Steamship Line, 116 John Street, New York City.
White & Case, Esqs., Attorneys for Trustees, 14 Wall Street, New York City.

[fol. 32] In United States District Court, Southern District of New York

No. 59,923

[Title omitted]

Affidavit of Roy H. Caldwell

State of New York,
County of New York, ss:

Roy H. Caldwell, being duly sworn, deposes and says that he is a member of the firm of Gazan & Caldwell, attorneys for Baxter N. Foust, as administrator of Coy E. Foust, deceased, who has an action pending in the United States District Court, for the Southern District of New York, and that the name or style of the aforesaid action is Baxter N. Foust, as administrator of Coy E. Foust against the Munson Steamship Line, and that the aforesaid action was instituted on or about January 15, 1934, and that the defendant thereafter duly appeared and interposed an an-
[fol. 33] swer. That the aforesaid action was duly noticed for trial in the United States District Court for the Southern District of New York, and bears docket No. L. 56, page 336, and its calendar number is 909.

Deponent states that this action was instituted to recover damages growing out of the death of Coy E. Foust, deceased, as more fully set forth in the complaint herein and claim was likewise made for the conscious pain and suffering sustained by the unfortunate decedent.

Deponent further states that on or about the 13th day of June, 1934, the Hon. Alfred C. Coxe, United States District Judge for the Southern District of New York, in the Matter of Munson Steamship Line, in Proceedings for Reorganization of a Corporation, being No. 59,923, signed an order staying the prosecution and institution of all actions.

Deponent is informed and verily believes that the administrator and his family were dependent upon the aforesaid Coy E. Foust, decedent herein, for support and that he contributed during his lifetime to the support of his father and his father's family.

Deponent further states that the order signed by Hon. Alfred C. Coxe on or about the 13th day of June, 1934, has

or will prevent this plaintiff from prosecuting his action to a final award much to the great distress and hardship of this unfortunate plaintiff who sustained not only a financial loss but also the loss of his son.

Deponent further states, upon information and belief, that the Munson Steamship Line was covered by liability [fol. 34] insurance and that any judgment recovered against the aforesaid Munson Steamship Line will have to be paid by the insurance company which covered any loss for loss of life or personal injuries on board the steamship "Mundelta" at the time in question.

Deponent further states that if the Court permits this administrator to perfect his claim to a final award, he will then bring suit under Section 109 of the Insurance Law of the State of New York for satisfaction of the award, if any.

Deponent believes that the Court in permitting a stay of this action is doing an injustice to the unfortunate administrator and his family and is not in any way benefiting the Munson Steamship Line, or those having claims against the Munson Steamship Line, as the final payment of this award must necessarily be made by the insurance company. The only party benefiting by the delay is the insurance company covering the loss.

Deponent is informed and verily believes that the Munson Steamship Line paid for this protection and accordingly the unfortunate administrator who lost his son, should not be prevented from having his day in court.

Deponent states that under the Merchant Marine Act of 1920 and the Bankruptcy Law as amended in January, 1934, this plaintiff is entitled to a trial by jury and further, that his claim is a preferred claim and this preferred claimant should not be stayed or prevented from having his day in court by reason of any fancied wishes or desire for delay on the part of the Munson Steamship Line who reck- [fol. 35] lessly and negligently caused the plaintiff's son to meet his death under a considerable period of pain and suffering.

Wherefore, deponent respectfully requests that an order be entered modifying the order heretofore signed by Hon. Alfred C. Coxe, on or about June 13, 1934, and permitting Baxter N. Foust as administrator of Coy E. Foust, de-

ceased, to prosecute his claim to a final award before a jury.

Deponent states that no previous application has been made for the relief herein requested.

Roy H. Caldwell.

Sworn to before me this 25th day of January, 1935. Eileen Koslow, Notary Public, Bronx County. Bronx Co. Clk's No. 213, Reg. No. 202K36. N. Y. Co. Clk's No. 974, Reg. No. 6K567. Commission expires March 30, 1936.

[fol. 36] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 59,923

[Title omitted]

AFFIDAVIT OF ALFRED N. HEUSTON, IN OPPOSITION TO MOTION TO MODIFY RESTRAINING ORDER

STATE OF NEW YORK,
County of New York, ss:

Alfred N. Heuston, being first duly sworn, deposes and says:

1. That he is associated with the firm of White & Case, attorneys for Edward P. Farley and Morton L. Fearey, [fol. 37] trustees of Munson Steamship Line, debtor, in the above entitled proceeding.

2. That this Court has heretofore denied three similar petitions made by Messrs. Caldwell & Gazan in other causes where they represent the plaintiffs; namely, Orlan Moore, John Larkin and Joseph A. Soucy, all against the debtor, for leave to proceed with their claims for damages for personal injuries to verdict and judgment against the debtor. The question of law raised by the said petitions, including the jurisdiction and authority of this Court to deal therewith, were fully briefed for the Court by the respective parties and after due and careful consideration this Court denied all of said petitions, and on January 7, 1935, signed an order in each of said three causes in the same form; a

copy of one of said orders is annexed hereto and made a part hereof.

Wherefore, affiant respectfully prays, on behalf of said trustees of the debtor, Munson Steamship Line, that the petition on behalf of Baxter N. Foust, as administrator of Coy E. Foust, deceased, be denied and that an order be entered herein in the same general form as the order entered in the case of Orlan Moore and the other petitioners referred to above.

Alfred N. Heuston.

Sworn to before me this 29th day of January, 1935.
James McGarron, Notary Public.

[fol. 38] IN UNITED STATES DISTRICT COURT

No. 59923

[Title omitted]

ORDER IN ORLAN MOORE MATTER DENYING MOTION TO MODIFY RESTRAINING ORDER—January 7, 1935

A motion having been regularly made by Orlan Moore in the case of Orlan Moore v. Munaires Steamship Corporation and Munson Steamship Line, now pending in the United States District Court for the Eastern District of New York for an order modifying the order signed by Hon. Alfred C. Coxe, United States District Judge, in the above captioned matter on the 13th day of June, 1934, in that the aforesaid order be modified to permit Orlan Moore above [fol. 39] named, to proceed to trial in the above entitled action and to prosecute his claim against the Munson Steamship Line to a final award and/or final awards against Edward P. Farley, Esq., and Morton L. Fearey, Esq., trustees for Munson Steamship Line, and said motion have regularly come on to be heard at a stated term of this court for the hearing of motions, and due deliberation having been had and said motion having been denied by this court.

Now, on reading and filing the notice of motion dated October 30, 1934, with admission of service thereof upon

the attorneys for Munson Steamship Line and for Edward P. Farley, Esq., and Morton L. Fearey, Esq., trustees for Munson Steamship Line, and the affidavit of Roy H. Caldwell, sworn to the 30th day of October, 1934, in support of said motion and the affidavit of Irving L. Evans, sworn to the 5th day of November, 1934, in opposition thereto, and after hearing Roy H. Caldwell, Esq., of counsel, in support of said motion, and Irving L. Evans, of counsel, in opposition thereto, and due deliberation having been had and the court having filed the opinion in writing on December 10, 1934,

Now, on motion of Gazan & Caldwell, attorneys for Orlan Moore, it is

Ordered that the motion to vacate the stay or to modify the same, be and it hereby is denied, and it is further

Ordered that a Special Master will be appointed to hear and report on the claim of the aforesaid Orlan Moore, if the [fol. 40] claimant so desires.

(Sgd.) Alfred C. Coxe, U. S. D. J.

IN UNITED STATES DISTRICT COURT

No. 59923

[Title omitted]

ORDER DENYING MOTION TO MODIFY RESTRAINING ORDER—March 20, 1935

A motion having been regularly made by Baxter N. Foust in the case of Baxter N. Foust, as Administrator of [fol. 41] Coy E. Foust, deceased, v. Munson Steamship Line, now pending in the United States District Court for the Southern District of New York, for an order modifying the order signed by Hon. Alfred C. Coxe, United States District Judge, in the above captioned matter on the 13th day of June, 1934, in that the aforesaid order be modified to permit Baxter N. Foust, as Administrator of Coy E. Foust, deceased, above named, to proceed to trial in the above entitled action and to prosecute his claim against the Munson Steamship Line to a final award and/or final awards against Edward P. Farley, Esq., and Morton L.

Fearey, Esq., trustees for Munson Steamship Line, and said motion having regularly come on to be heard at a stated term of this court for the hearing of motions, and due deliberation having been had and said motion having been denied by this court.

Now, on reading and filing the notice of motion, dated January 25, 1935, with admission of service thereof upon the attorneys for the Munson Steamship Line and upon the attorneys for Edward P. Farley, Esq., and Morton L. Fearey, Esq., trustees for Munson Steamship Line, and the affidavit of Roy H. Caldwell, sworn to the 25th day of January, 1935, in support of said motion and the affidavit of Alfred N. Heuston, sworn to on the 29th day of January, 1935, in opposition thereto, and after hearing Simone N. Gazan, Esq., of counsel, in support of said motion, and Irving L. Evans, of counsel, in opposition thereto, and due deliberation having been had and the court hav-

[fol. 42] ing filed its opinion in writing,

Now, on motion of Gazan & Caldwell, attorneys for Baxter N. Foust as Administrator of Coy E. Foust, deceased, it is

Ordered, that the motion to vacate the stay or to modify the same, be and it hereby is denied, and it is further

Ordered, that a Special Master will be appointed to hear and report on the claim of the aforesaid Baxter N. Foust as Administrator of Coy H. Foust, deceased, if the claimant so desires.

Alfred C. Coxe, U. S. D. J.

[fol. 43] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 59,923

[Title omitted]

NOTICE OF APPEAL

SIRS:

Please Take Notice that Baxter N. Foust, as Administrator of Coy E. Foust, deceased, in an action against the Munson Steamship Line, the claimant herein, hereby ap-

peals to the United States Circuit Court of Appeals for the Second Circuit from the order signed by the Hon. Alfred C. Coxe, United States District Judge, Southern District of New York, dated the 20th day of March, 1935, and entered in the office of the Clerk of this Court, and from each and every part of said order.

Dated, New York, N. Y., April 2, 1935.

Yours, etc., Gazan & Caldwell, Attorneys for Claimant, Office & P. O. Address, 1 Broadway, New York City.

[fol. 44] To White & Case, Esqs., Attorneys for Trustees, 14 Wall Street, New York City. Tompkins, Boal & Tompkins, Esqs., Attorneys for Munson Steamship Line, 116 John Street, New York City.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 59,923

[Title omitted]

MOTION FOR LEAVE TO APPEAL AND ORDER ALLOWING APPEAL

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Baxter N. Foust, as Administrator of Coy [fol. 45] E. Foust, deceased, in an action against the Munson Steamship Line, respectfully shows:

I. That on or about the 20th day of March, 1935, an order was made herein by Hon. Alfred C. Coxe, denying a motion made by petitioner herein for an order modifying the order signed by the Hon. Alfred C. Coxe, United States District Judge, in the aforesaid captioned matter on the 13th day of June, 1934.

II. I am advised that the said order denying the motion made by petitioner herein for an order modifying the order made by the Hon. Alfred C. Coxe, United States District Judge, on the 13th day of June, 1934, is erroneous as a matter of law.

III. Filed herewith are the assignments of error in which I have set forth what I believe to be the errors committed by the court in making said order, dated the 20th day of March, 1935.

Wherefore, I respectfully pray for leave to appeal to the United States Circuit Court of Appeals for the Second Circuit and that this petition for appeal be allowed as required by law and for such other and further relief as in the premises may seem proper.

Dated, April 3rd, 1935.

Gazan & Caldwell, Attorneys for Petitioner, by Roy H. Caldwell.

Petition for leave to appeal allowed this 4th day of April, 1935.

Henry W. Goddard, U. S. D. J.

[fol. 46] *Duly sworn to by Roy H. Caldwell. Jurat omitted in printing.*

[fol. 47] In United States District Court, Southern District of New York

No. 59,923

[Title omitted]

Assignments of Error

The petitioner, Baxter N. Foust, as administrator of Coy E. Foust in an action against Munson Steamship Line, for his assignment of errors upon the decision of the Court, dated the 20th day of March, 1935, denying the motion of petitioner for an order modifying the order of Hon. Alfred C. Coxe, United States District Judge for the Southern District of New York, signed the 13th day of June, 1935, alleges that the Court committed the following errors:

1. The Court erred in refusing to modify the order signed by the Hon. Alfred C. Coxe, on the 13th day of June, 1934, in order to grant the petitioner the right of trial by jury.

[fol. 48] 2. The Court erred in refusing the petitioner as administrator of a deceased seaman under Section 33 of the Merchant Marine Act of 1920, the right of trial by jury.

3. The Court erred in refusing to grant petitioner as administrator of a deceased seaman the right of trial by jury under common-law.

4. The Court erred in refusing to grant petitioner as administrator of a deceased seaman the right of trial by jury under Section 77B of the Bankruptcy Act.

5. The Court erred in refusing to grant petitioner as administrator of a deceased seaman the right of a common law trial by jury under Section 205, U. S. C. A., Title 11, as Amended to March 3, 1934, sub-paragraph S.

6. The Court erred in depriving petitioner as administrator of a deceased seaman of his constitutional right of trial by jury.

Dated, New York, April 3, 1935.

Gazan & Caldwell, Attorneys for Claimant, Office & P. O. Address, 1 Broadway, New York City.

[fol. 49] Citation, in usual form, omitted in printing.

[fol. 50] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 59,923

[Title omitted]

NOTICE OF MOTION FOR ORDER GRANTING LEAVE TO APPEAL

SIRS:

Please Take Notice that on the annexed verified petition of Baxter N. Foust, as administrator of Coy E. Foust, deceased, the claimant herein, and upon the petition for appeal and assignment of errors, dated the 1st day of April, 1935, and filed in the office of the clerk of the United States District Court for the Southern District of New York, and on the order of the Hon. Alfred C. Coxe, District Judge for the Southern District of New York, dated the 20th day of March, 1935, which order denied the motion of claimant to

modify the order of the Hon. Alfred C. Coxe, United States [fol. 51] District Judge, signed on the 13th day of June, 1934, an application will be made at a motion term of this court to be held in room 434 in the Post Office Building in the Borough of Manhattan, City of New York, on the 8th day of April, 1935, at 10:30 A. M. in the forenoon of that day or as soon thereafter as counsel can be heard for an order granting leave to appeal pursuant to Section 24 B of the Bankruptcy Act from the order made by the Hon. Alfred C. Coxe, dated the 20th day of March, 1935, and for such other and further relief as may be proper.

Dated, April 1st, 1935.

Yours, etc., Gazan & Caldwell, Attorneys for Claimant, Office & P. O. Address, 1 Broadway, New York City.

To White & Case, Esqs., Attorneys for Trustees, 14 Wall Street, New York City. Tompkins, Boal & Tompkins, Esqs., Attorneys for Munson Steamship Line, 116 John Street, New York City.

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 59,923

[Title omitted]

PETITION FOR LEAVE TO APPEAL

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petition of Baxter N. Foust, as administrator of Coy E. Foust, deceased, who has an action pending in the United States District Court for the Southern District of New York in the name and style of Baxter N. Foust, as administrator of Coy E. Foust, deceased, v. Munson Steamship Line, respectfully shows:

1. That the aforesaid action was instituted in the aforesaid court on or about January 15, 1934, and that the defendant thereafter duly appeared and interposed an an-[fol. 53] swer. That the aforesaid action was duly noticed for trial in the United States District Court for the South-

ern District of New York, and bears docket No. L. 56, page 336, and its calendar number is 909.

That this petitioner respectfully states that this action was instituted to recover damages growing out of the death of Coy E. Foust, deceased. That the aforesaid Coy E. Foust met his death on or about February 20, 1932, while employed as a member of the crew of the steamship "Mundelta," at Searsport, Maine, by reason of the negligence of the owner and operator of the steamship "Mundelta" in failing among other things to provide the decedent a safe place in which to work; in failing to have sufficient light in 'tween decks; in failing to have guard rails around an open hatch; in permitting the top deck hatch to be and remain covered, thereby excluding daylight from entering the 'tween decks; in failing to furnish adequate artificial light in 'tween decks about #1 and #2 hatches while decedent was engaged in work; in failing to warn decedent of dangers to be encountered in connection with the work.

That the aforesaid action was brought to recover damages under Section 33 of the Merchant Marine Act of Congress commonly known as the Jones Act.

2. That on or about the 25th day of January, 1935, the claimant herein moved for an order modifying the order signed by the Hon. Alfred C. Coxe, United States District [fol. 54] Judge, in the aforesaid captioned matter on the 13th day of June, 1934, in that the aforesaid order be modified to permit Baxter N. Foust, as administrator to proceed to prosecute his claim against the Munson Steamship Line to a final award and/or final awards against Edward P. Farley, Esq., and Morton L. Fearey, Esq., trustees for Munson Steamship Line and for such other, further and different relief as may be just and proper.

3. That the Hon. Alfred C. Coxe, United States District Judge for the Southern District of New York on the 20th day of March, 1935, arrived at a decision and denied claimant's motion for an order modifying the order heretofore entered in the above captioned matter on or about the 13th day of June, 1934. That the aforesaid order was entered on the 20th day of March, 1935, a copy of which order is attached hereto and made a part thereof.

4. It is respectfully shown that the learned Court below is in error in denying the motion made by your petitioner

to modify the order of the Hon. Alfred C. Coxe, dated the 13th day of June, 1934. That it was a matter entirely within the discretion of the aforesaid Court as to whether or not Baxter N. Foust, as administrator, should be permitted to proceed to trial before a jury and that the Court's discretion should have been exercised in favor of claimant so that claimant would not be deprived of substantial rights. [fol. 55] That the petitioner is entitled under the U. S. C. A., Title 46, Section 688, commonly known as Section 33 of the Merchant Marine Act of 1920, to a trial by jury; regardless of the fact that the Munson Steamship Line has instituted proceedings for reorganization of the corporation under Section 77B of the Bankruptcy Act as amended, because the aforesaid action was brought under U. S. C. A., Title 46, Section 688, which reads as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, *with the right of trial by jury, and in such action . . . statutes of the United States modifying or extending the common-law right of remedy in cases of personal injury to railway employees shall apply;* and in case of death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law *with the right of trial by jury,* and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Italics ours.)

That the petitioner has a right to a common law action with trial by jury and to have damages fixed by jury and not by any referee or commissioner in bankruptcy appointed by this Court.

[fol. 56] The precedent established in The Kerney, 3 Fed. Supp. 718, should be followed in this case, for the right of trial by jury should not lightly be taken away from this petitioner. A steamship company should not be allowed to benefit by its own wrong.

In Panama R. Co. v. Vasquez, 36 S. Ct. 557, it was held in an action by the personal representative of a deceased

seaman under Section 33 of the Merchant Marine Act of 1920 against a ship owner to recover for the seaman's death owing to the alleged negligence of the owner, that Congress reserved to suitors of cases the right to common-law remedy where the common-law is competent to give it.

Petitioner's claim was brought under Section 33 of the Merchant Marine Act and is a preferred claim against the Munson Steamship Line in either receivership or reorganization in view of the facts of the United States statutes above cited and again in view of Section 205, U. S. C. A., Title 11, as amended to March 3, 1934, Paragraph S, which reads as follows:

"In proceedings under this section, claims for personal injuries to employees of a railroad corporation and claims of personal representatives of deceased employees of a railroad corporation arising under State or Federal Laws, shall be preferred claims against the assets of such railroad corporation in receivership or in reorganization as herein provided, such claims to be subordinate only to costs of administration of such receivership or reorganization."

[fol. 57] That it was the intention of Congress not to take away any of the rights of the employees of railroad corporations or merchant seamen whose rights have been expressly defined by Congress and by the United States Supreme Court time after time as expressly as those of an employee of a railroad corporation and is borne out — Paragraph O of Section 77B of the Bankruptcy Act which reads as follows:

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of this court, the duties of the debtor *and the rights and liabilities of creditors,* and of all persons with respect to the debtor and its property, *shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved.*" (Italics ours.)

It is needless to say that Congress expressly provided that claims of seamen for damages for personal injuries is a preferred claim against the owners of steamship companies in receivership or in reorganization and it naturally

follows that a seaman is entitled to a common-law trial by a jury.

The mere fact that Congress was silent with reference to seamen in Section 77B, does not mean that the rights of a seaman to a common-law trial are in any way limited or denied.

It has been uniformly held that a statute is not repealed by implication.

[fol. 58] Petitioner respectfully alleges on information and belief that the Munson Steamship Line was covered by liability insurance and that any judgment recovered against the Munson Steamship Line will have to be paid by the insurance company which covered any loss for loss of life or personal injury on the Steamship "Mundelta" at the time in question and that if the Court permits this petitioner to prosecute his claim to a final judgment by jury, that it would not in any way injure the Munson Steamship Line nor those who have claims against the Munson Steamship Line as petitioner is informed and believes and that the final payment of the judgment, if any, must necessarily be made by the insurance carrier who is the only party benefiting by the proceeding under Section 77B of the Bankruptcy Act. Under the Insurance Law of New York, Section 109, every policy written in New York must contain a statement that the injured seaman may proceed to collect from the insurance company in the event of bankruptcy or insolvency of the steamship owner. Therefore, if a trial by jury is denied to seamen who may have claims against the steamship line, the benefit of such action will inure not to the bankrupt estate but to the insurance carrier.

Petitioner agrees that in the event this Court grants the right to reduce the claim of this petitioner to judgment before a jury, petitioner will move expeditiously to have this case placed upon the calendar for early trial and to apply to Judge Knox in the Southern District to grant a preference and petitioner is confident that after Judge Knox [fol. 59] understands that the object of obtaining a preference is to enable the Bankruptcy Court to act promptly in the reorganization proceedings he will cooperate to that end.

In this claim, the Munson Steamship Line is represented by Tompkins, Boal & Tompkins of No. 116 John Street,

New York City, who represents the insurance carrier and consequently the defense of this case will impose no burden whatsoever, either financial or otherwise, upon the trustees herein or their counsel. The trustees are not necessary parties to the action and the suit may proceed to trial without interfering with the orderly administration of this debtor's affairs.

5. By denying this motion to modify the order signed by the Hon. Alfred C. Coxe, dated June 13, 1934, the Court has deprived this petitioner of the only effective method of obtaining relief under Section 33 of the Merchant Marine Act of 1920 and has deprived your petitioner of the right of trial by jury.

Wherefore your petitioner prays that an order be made granting leave to appeal from the decision made by Hon. Alfred C. Coxe, United States District Judge, Southern District of New York, dated the 20th day of March, 1935, and for such other and further relief as may be proper.

Gazan & Caldwell, as Attorneys for Baxter N. Foust, Petitioner, by Roy H. Caldwell.

(Verification omitted and copy order of Judge Coxe attached to motion also omitted as elsewhere contained in this record.)

[fol. 60] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 59,923

[Title omitted]

AFFIDAVIT OF IRVING L. EVANS, IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

STATE OF NEW YORK,
County of New York, ss:

Irving L. Evans, being duly sworn, deposes and says:

That he is of counsel for Edward P. Farley and Morton L. Fearey, Esqs., trustees for the Munson Steamship Line

in Reorganization; that he is familiar with the matters concerning this petition.

That the Munson Steamship Line filed a petition for reorganization under Section 77B of the Bankruptcy Act, and pursuant to said petition and said section of the Bankruptcy Act an order was entered in the United States District Court for the Southern District of New York on the 13th day of June, 1934, enjoining all pending litigation against the Munson Steamship Line. No appeal has ever [fol. 61] been taken from that order. Further orders have been entered directing the filing of claims with the trustees. The time for filing such claims has been extended to April 30, 1935.

The petitioner, Baxter N. Foust, as administrator of Coy E. Foust, deceased, made a motion to vacate the order of June 13th or to modify it so as to permit him to proceed to trial in the action which he had instituted against the Munson Steamship Line to the point of final award or awards against Edward P. Farley, Esq., and Morton L. Feary, Esq., as trustees of the Munson Steamship Line. Judge Coxe signed an order under date of March 20th, 1935, denying this motion, a copy of which order is attached to the petition and made a part thereof. It recites

"Now on motion of Gazan & Caldwell, attorneys for Baxter N. Foust as Administrator of Coy E. Foust, deceased, it is

"Ordered that the motion to vacate the stay or to modify the same, be and it hereby is denied, and it is further

"Ordered that a Special Master will be appointed to hear and report on the claim of the aforesaid Baxter N. Foust as Administrator of Coy E. Foust, deceased, if the claimant so desires."

This is an attempt to appeal from the decree of June 13, 1934 at this date by the device of a motion to vacate or modify it and by taking an appeal from the denial of such motion.

The petitioner concedes that this matter is entirely within the discretion of the District Court. The fourth assign- [fol. 62] ment of error, on page 2 of the petition, states:

"It is respectfully shown that the learned court below is in error in denying the motion made by your petitioner to modify the order of the Hon. Alfred C. Coxe, dated the 13th

day of June, 1934. That it was a matter entirely within the discretion of the aforesaid court as to whether or not Baxter N. Foust as administrator, should be permitted to proceed to trial before a jury and that the court's discretion should have been exercised in favor of claimant so that claimant would not be deprived of substantial rights."

There is no allegation of any abuse of discretion and no facts set forth to show any abuse of discretion in the petition.

An order entered by the District Court on a matter within its discretion is not properly appealable to this Court under Section 24B of the Bankruptcy Act under which this motion is made.

It is respectfully submitted that the motion for leave to appeal should be denied.

Irving L. Evans.

Subscribed and sworn to before me this 15th day of April, 1935. Elizabeth M. Childs, Notary Public. Kings Co. Clk's No. 118, Reg. No. 6107. N. Y. Co. Clk's No. 212, Reg. No. 6C102. Term expires March 30, 1936.

[fol. 63] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In re MUNSON STEAMSHIP LINE

Before L. Hand, Swan and Chase, Circuit Judges

On motion for leave to appeal.

Gazan & Caldwell, for the motion.
Irving L. Evans, opposed.

OPINION GRANTING LEAVE TO APPEAL

Per CURIAM:

Leave to appeal will be granted not because the appellant may have a right to trial by a jury of his claim against the company upon its reorganization, but because we are in doubt whether the cause will be discharged by the final order in the reorganization proceedings; Sec. 77-B (h), (k) and

(o). If it will not be, it may be that the court should not stay the action at all; Sec. 11 (a).

The briefs and argument will not, therefore, touch the right of trial by jury of the claim in reorganization as to which leave is denied; it will be confined to whether the action can be stayed at all.

[fol. 64] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER GRANTING LEAVE TO APPEAL—May 6, 1935

A motion having been made hereby by counsel for the appellant for leave to appeal from a certain order of the District Court, dated March 20, 1935,

Upon consideration thereof, it is

Ordered that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 65] IN UNITED STATES CIRCUIT COURT OF APEALS, SECOND CIRCUIT

No. 59,923

[Title omitted]

MOTION FOR LEAVE TO FILE SUPPPLEMENTAL ASSIGNMENTS OF ERROR

SIRS:

Please Take Notice that Baxter N. Foust, as Administrator of the Estate of Coy E. Foust, deceased, claimant, against the trustees of the Munson Steamship Line, debtor, in Reorganization Proceedings in the United States District Court for the Southern District of New York, upon the affidavit of Simone N. Gazan, duly verified the 7th day of May, 1935, and upon the application for leave to appeal and the order of this Court thereon, allowing the appeal, and upon all proceedings had in the United States District Court for the Southern District of New York, an applica-

tion will be made at a motion term of this court to be held in Room 435 in the Old Post Office Building in the Borough [fol. 66] of Manhattan, City of New York on the 13th day of May, 1935 at 10:30 A. M. on said date, or as soon thereafter as counsel may be heard, for leave to file supplemental assignments of error, pursuant to an order of this court, dated April 29, 1935, in respect of an application of this movant for leave to appeal, and for an order authorizing, directing and allowing the said movant to file nunc pro tunc supplemental assignments of error, a copy of said assignments of error being hereto attached, and for such other, further and different relief as may be proper.

Yours, etc., Gazan & Caldwell, Office & P. O. Address, 1 Broadway, New York City.

To White & Case, Attorneys for Trustees of the Munson Steamship Line, 14 Wall Street, New York City. Tompkins, Boal & Tompkins, Attorneys for Munson Steamship Line, 116 John Street, New York City.

[fol. 67] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF SIMONE N. GAZAN, IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

Simone N. Gazan, on oath, deposes and says, that he is a member of the law firm of Gazan & Caldwell, which firm are attorneys for Baxter N. Foust, as Administrator of Coy E. Foust, deceased, and that deponent is entirely familiar with the claim of said client.

Deponent says that administrator brought a common law action against Munson Steamship Line in the United States District Court for the Southern District of New York. That the summons and complaint were served on January 15th, 1934, and answer was served on February 5th, 1934.

That on or about June 13th, 1934, the Munson Steamship Line filed a petition as an insolvent debtor and sought reorganization in bankruptcy. That an order was made and

entered whereby certain trustees were appointed, and a general stay against the prosecution of all suits and claims was also ordered.

[fol. 68] At the time of the filing of the petition for reorganization this Foust case had not been reached for trial, and, of course, no judgment had been entered.

The death of Coy E. Foust occurred on a vessel of the Munson Steamship Line under circumstances of such negligence as would make the employer liable in damages for the pecuniary loss sustained by the beneficiaries of said decedent; that the said administrator had and has a good cause of action for damages.

At the time of this accident the Munson Steamship Line carried liability insurance to protect itself against loss or damages by reason of such negligent injury or death, which said policy was in force at the time, and that under Section 109 of the Insurance Law of the State of New York the said administrator, once obtaining a judgment for damages against the insured Munson Steamship Line, could, in view of the insolvency of the said insured, recover against the insurance company the amount of said judgment less any deductible in favor of the insured.

Deponent says that under said Insurance Law the administrator had and has a substantial right against said insurance company; that a recovery from such insurer will in no way affect the assets of the said debtor; that the defense of the action would be upon the insurance company and its attorneys and not upon the trustees of Munson Steamship Line; that the orderly administration of the proceedings in bankruptcy would not be affected.

In view of the foregoing the said administrator, as plaintiff in the common law action, applied for a modification of the stay so that the claim could be reduced to judgment [fol. 69] and its amount thereby fixed, so that proceedings could thereupon be instituted against the insurance company, and that said claimant be not required to make proof before a referee and have the claimant considered as a creditor in the reorganization proceedings.

This application was denied. Exceptions were duly taken and notice of appeal served, filed and allowed.

A motion was made in this court for leave to appeal but this was denied as to any question involving the right to a jury trial, but leave was granted to present the ques-

tions as to whether such claim would be discharged by the final order in the reorganization proceedings and, whether the court should stay said common law action at all.

The said plaintiff desires to avail himself of this privilege of appeal but being in doubt if the questions specified are adequately covered by the original assignments of error of file, moves the court for permission to serve and file supplemental assignments of error, a copy of the proposed assignments being hereto attached.

Simone N. Gazan.

Sworn to before me this 7th day of May, 1935. Eileen Koslow, Notary Public, Bronx County. Bronx Co. Clk.'s No. 213, Reg. No. 202K36. N. Y. Co. Clk.'s No. 974, Reg. No. 6K567. Commission expires March 30, 1936.

(Proposed supplemental assignments of error, attached to motion, omitted because contained elsewhere in this record.)

[fol. 70] In United States Circuit Court of Appeals for the Second Circuit

No. 59,923

[Title omitted]

Affidavit of Alfred N. Heuston, in Opposition to Motion for Leave to File Supplemental Assignments of Error

State of New York,
County of New York, ss:

Alfred N. Heuston, being duly sworn, deposes and says:

He is associated with the firm of White & Case, attorneys for Edward P. Farley and Morton L. Fearey, trustees for the Munson Steamship Line in Reorganization, and that he is familiar with the matters concerning this appeal and this motion.

This Court in granting the motion for leave to appeal filed a per curiam opinion stating that it allowed the appeal "because we are in doubt whether the cause will be discharged by the final order in the reorganization proceed-

ings; Sec. 77-B (h), (k) and (o). If it will not be, it may be that the court should not stay the action at all; Sec. 11 (a).

[fol. 71] "The briefs and argument will not, therefore, touch the right of trial by jury of the claim in reorganization as to which leave is denied; it will be confined to whether the action can be stayed at all."

This Court has stated the issue on which the case is to be argued on appeal and no further assignments of error are necessary and they will only tend to further encumber the record and confuse the issue. Nothing further is added by the suggested supplemental assignments of error numbers 7 and 8. Supplemental assignment of error number 9 covers matters which are not in the record, questions which were not before the District Court and many statements of fact which are erroneous, which we should not be called upon to disprove in this Court. Even if leave to file the supplemental assignments of error is permitted, it should be confined to numbers 7 and 8 and should not be allowed as to number 9 because that brings into the case in this Court new facts and new questions which were not before the District Court and not considered by it.

It is respectfully submitted that motion for leave to file supplemental assignments of error should be denied, but if allowed, should be restricted to numbers 7 and 8.

Alfred N. Heuston.

Sworn to before me this 10th day of May, 1935. Addison Y. Yeaman, Notary Public, Westchester County. N. Y. Co. Clk.'s No. 45, Reg. No. 7Y27. Certificate filed in Westchester Co. Commission expires March 30, 1937. (Seal.)

[fol. 72] IN THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER ALLOWING SUPPLEMENTAL ASSIGNMENTS OF ERROR—May 20, 1935

A motion having been made herein by counsel for claimant for leave to file supplemental assignments of error.

Upon consideration thereof, it is

Ordered that the said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 73] IN THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

No. 59,923

[Title omitted]

SUPPLEMENTAL ASSIGNMENTS OF ERROR

7. Because the court erred in staying the prosecution of the common law action for tort commenced by Baxter N. Foust as administrator aforesaid to recover pecuniary loss sustained by the beneficiaries of the said decedent by reason of his death by wrongful act, and in refusing to vacate or modify said stay so as to permit the prosecution of said action to judgment, because said action for tort not reduced to judgment at the time of proceedings were filed, is one not cognizable in bankruptcy, nor within the intendment and scope of Section 77b of the Bankruptcy Law.

8. Because the court erred in granting a stay and thereby restraining the prosecution to judgment of the said cause [fol. 74] of action for death by wrongful act, and in refusing to vacate or modify said stay so as to permit said common law action to be prosecuted to judgment, for that said cause of action, and any judgment recovered after filing of the debtor's petition would not constitute such an existing or fixed liability within the purview of the Bankruptcy Law, and particularly Section 77b thereof, because such judgment for tort would not be discharged by a decree of discharge in said reorganization or bankruptcy proceedings.

9. The court further erred in granting a stay as to this particular cause of action, and in refusing to vacate or modify its order of stay so as to permit the said common law action to proceed to judgment against the Munson Steamship Line, because the cause of action arose, and the suit thereon commenced, before the filing of the Reorganization Proceedings in Bankruptcy, and because the Munson Steamship Line carried liability insurance for the purpose of indemnifying itself against loss by reason of a cause of action of this nature, and that under the provisions of Section 109 of the Insurance Law of the State of New York, the judgment-tort-creditor has a right of action, upon the insolvency or bankruptcy of the judgment-tort-debtor, directly against said insurance company and that it was a denial of due process of law and of the equal protection of the laws, and it was a deprivation of a substantial legal right to prevent and deny said plaintiff the right to obtain judgment against the Munson Steamship Line so that thereby, upon the insolvency or bankruptcy of the Munson Steamship Line, said plaintiff could avail himself [fol. 75] of the said provisions of the Insurance Law, all of which could have been done without detriment or loss to the Munson Steamship Line or any of its assets, and without impediment to or interference with the reorganization proceedings, and was in no wise an effort to enforce any lien upon the estate.

Gazan & Caldwell, Attorneys for Baxter N. Foust, as Administrator of the Estate of Coy E. Foust, Office and P. O. Address, 1 Broadway, New York City.

IN THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, by and between the attorneys representing the respective parties to the above [fols. 76 and 77] entitled case that the foregoing is a true transcript of the record of the said District Court in the above entitled case, as agreed on by the parties.

It is further stipulated and agreed that either party may have printed in a supplemental transcript of record and refer to on the argument, any papers filed in the above proceedings.

Dated, New York, June —, 1935.

Gazan & Caldwell, Attorneys for Appellant. White & Case, Attorneys for Trustees of Munson Steamship Line, Debtor.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 78] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Argued Oct. 23, 1935. Decided Jan. 6, 1936

No. 77

In the Matter of MUNSON STEAMSHIP LINE, Debtor

Ex parte BAXTER N. FOUST, as Administrator of Coy E. Foust, Deceased, Appellant,

v.

MUNSON STEAMSHIP LINE and EDWARD P. FARLEY and MORTON L. FEAREY, Trustees, Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Appeal from United States District Court for the Southern District of New York.

From an order denying a motion by Baxter N. Foust, as administrator of Coy E. Foust, deceased, to vacate or modify a restraining order enjoining the prosecution of an action at law to recover damages against the debtor arising because of the death of the son of Baxter N. Foust, the latter appeals.

Gazan & Caldwell, of New York City, for appellant, Baxter N. Foust, as administrator, etc.

Tompkins, Boal & Tompkins and White & Case, all of New York City (Arthur M. Boal, Charles J. Fay, and Alfred W. Heuston, all of New York City, of counsel), for appellees.

AUGUSTUS N. HAND, Circuit Judge:

The debtor, Munson Steamship Line, on June 11, 1934, filed a petition for reorganization under section 77B of the Bankruptcy Act (11 U. S. C. A. § 207). On June 13, 1934, the District Court made an order approving the petition

and appointing Edward P. Farley and Morton L. Fearey temporary trustees and enjoining all persons "from instituting or prosecuting or continuing the prosecution of any action at law or action or proceeding in equity or admiralty or bankruptcy against the debtor or the trustees in any court of law or equity or admiralty or bankruptcy. * * *"

The appellant, Baxter N. Foust, as administrator, on February 1, 1934, brought an action against the Munson Steamship Line, under the Jones Act (46 U. S. C. A. § 688), to recover damages for the death of Coy E. Foust, a seaman employed on one of its steamers, which was alleged to have been caused by the negligence of the defendant in not providing the seaman with a safe place to work. On February 7, 1934, the defendant filed its answer.

On January 26, 1935, Baxter N. Foust, as administrator, made a motion before the District Court in the proceeding under section 77B for the modification of the restraining order so as to permit him to prosecute his claim. It was [fol. 79] stated in the moving affidavit that the Munson Steamship Line was covered by liability insurance, that any judgment recovered would have to be paid by the insurance company, and that, if the administrator should be allowed to obtain judgment in the pending action, he would then bring suit under section 109 of the Insurance Law of the state of New York (Consol. Laws, c. 28) for the satisfaction of the award. It was also alleged that under the Merchant Marine Act of 1920, 41 Stat. 988, and the Bankruptcy Act, as amended in 1934, the claimant was entitled to a trial by jury and that his claim was preferred.

The court made an order denying the motion to modify the order, as it had done in the cases of three other tort claimants, and provided that a special master should be appointed to hear and report as to the claim, if Foust should so desire. It is from that order that the present appeal was taken. We allowed the appeal upon the theory that the only question was whether the District Court had any power to stay the action and instructed counsel only to argue that point. Accordingly, we must determine whether there was power in the District Court to stay the action of Foust in the Supreme Court of New York.

In clause (c) (10) of section 77B (11 U. S. C. A. § 207 (c) (10) it is provided that, in addition to the power given by section 11 of the original Bankruptcy Act (11 U. S.

C. A. § 29) to grant stays of suits founded upon claims from which a discharge would be a release, the judge in the 77B proceeding "may enjoin or stay the commencement or continuation of suits against the debtor until after final decree." The power to grant stays in aid of a reorganization is thus far more sweeping than the power granted in ordinary cases of bankruptcy, and in Continental Illinois Nat. Bank v. Chicago, Rock Island R. Co., 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110, the Supreme Court upheld a stay in the case of a railroad reorganization under section 77 (11 U. S. C. A. § 205) even where it was to prevent banks holding collateral notes from selling the collateral under the terms of their contracts.

But the claim of Foust as administrator is dischargeable in a 77B proceeding so that there was power to enjoin its prosecution not only under (c) (10) of 77B (11 U. S. C. A. § 207 (c) (10) but under section 11 of the original Bankruptcy Act (11 U. S. C. A. § 29). Section 77B (b) (10), 11 U. S. C. A. § 207 (b) (10) defines creditors as "all holders of claims of whatever character against the debtor or its property," and clause (h), 11 U. S. C. A. § 207 (h), provides that the final decree confirming the plan of reorganization "shall discharge the debtor from its debts and liabilities." It is apparent from this broad language of clauses (b) (10) and (h), supra, that a discharge of the debtor under a plan of reorganization is not dependent on whether the claim in question would be dischargeable in a strict bankruptcy proceeding but embraces liabilities of every kind whether fixed or contingent. Indeed, reorganizations would often be impracticable if the plans did not provide for a discharge of all liabilities and resumption of business left the debtor with tort liabilities which had not been adjudicated prior to the filing of the 77B petition. The words of clause (h) granting a discharge, not only from debts, but from "liabilities," and also the language of clause (c) (6), 11 U. S. C. A. § 207 (c) (6), which requires the judge to set a time within which the claims of stockholders as well as those of creditors shall be proved, make it plain that liabilities of every kind are to be discharged in a reorganization under section 77B. Subdivision (k), 11 U. S. C. A. § 207 (k), dealing with an order for liquidation of the estate, where a plan of reorganization has failed, and subdivision (o), 11 U. S. C. A. § 207 (o), making the provisions of the old Bank-

ruptcy Act generally applicable in 77B proceedings, are to be read with the limitations in clauses (b) (10), (c) (6) and (h), supra. In view of the foregoing, we hold that there was power in the District Court to stay the action by Foust.

At the time we allowed the appeal we thought that the only question to be considered was the power of the District Court to stay the action brought by Foust, but a perusal of the record upon this appeal leaves us with considerable doubt whether it was just to grant a stay against all proceedings in the action in the state court. As we have already said, the Munson Steamship Line was covered by liability insurance. Section 109 of the Insurance Law of [fol. 80] the state of New York requires that a liability policy shall contain a provision that "the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy."

Now the condition of liability of the insurance company under the policy will only be fulfilled if a judgment is recovered by the claimant and an execution thereon is returned unsatisfied. It is somewhat doubtful whether an order of the bankruptcy court allowing Foust's claim would be the equivalent of the execution required by section 109 of the Insurance Law, for an execution never issues out of that court, at least in a literal sense. But, even if an order of the bankruptcy court allowing the claim could be said to be the equivalent of an execution, the question would arise whether Foust, after receiving from the Munson Steamship Line whatever dividend might be paid him under the plan of reorganization, would be able to recover the balance of his claim from the carrier to the extent that such balance, plus what he had received as a dividend, did not exceed the face of the policy. This would depend on whether the words "returned unsatified" in section 109 not only mean

"wholly" but also "partially unsatisfied." The latter meaning of "unsatisfied" would subject the carrier to two actions, one by the insured Munson Line to recover the dividend paid and the other by Foust for any balance not in excess of the policy. It may be argued with some, though not altogether convincing, force that such twofold causes of action are not authorized by section 109. It would probably simplify matters to allow the action in the state court to proceed. If Foust should recover judgment in that action, the execution would be returned "unsatisfied," and he then could proceed to collect his whole claim from the carrier by direct suit pursuant to section 109. But it is common experience that jurors often return far larger verdicts in negligence actions than reason justifies. The trustees of the debtor have a pefect right to take this into account and not to accede to a method for the liquidation of the tort claims that is unusual in bankruptcy unless the ordinary method of proof before a special master would imperil the claimant's rights. If Foust is willing to stipulate not to use any judgment he may recover in the state action as a claim against the estate, there could be no objection to allowing that action to proceed to judgment. It may be argued that such a stipulation would endanger his rights against the carrier, but it is hard to see how it could if the execution was returned wholly unsatisfied. Such a return would create a direct liability to Foust on the part of the carrier. The latter would, however, in no event be compelled to pay more than the amount of the damages for the death of Foust's decedent so far as that amount did not exceed the face of the policy.

Although the order allowing this appeal was in general terms, none of the problems we have suggested has been discussed, because we said in our per curiam opinion that only the power to grant a stay would be considered. The appeal should not be finally determined without giving the parties a chance to present their views as to whether the District Court ought not to allow the state court action to proceed to judgment. There would be no occasion to do this if the appellant Foust is willing to stipulate not to use any judgment recovered in his favor as a claim against the debtor's estate. But, if such a stipulation is not filed by the appellant within three days, supplemental briefs shall be filed within ten days thereafter relating to the propriety of the exercise of the

judicial discretion of the District Court, whereupon we shall determine whether the stay ought to stand in the absolute form in which it was granted.

[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms in the United States Court House in the City of New York, on the 13th day of January, one thousand nine hundred and thirty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

In the Matter of MUNSON STEAMSHIP LINE, Debtor; BAXTER N. FOUST, as Administrator, etc., Appellant

This cause having come on to be heard on the transcript of Record from the District Court of the United States for the Southern District of New York, it is

Ordered that if the Plaintiff within three days from the entry of this order stipulates not to use any judgment recovered in his favor in his action against the Munson Steamship Line as a claim against the debtor's estate, the order appealed from be reversed. But if the plaintiff fails to file such stipulation, supplemental briefs shall be filed within ten days thereafter, relating to the propriety of the exercise of the judicial discretion of the District Court, and thereupon the cause shall stand for determination on such briefs.

Wm. Parkin, Clerk.

[fol. 82] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Munson Steamship Line. Order. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 13, 1936. William Parkin, Clerk.

[fol. 83] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Argued Oct. 23, 1935. Decided Feb. 10, 1936

No. 77

In the Matter of MUNSON STEAMSHIP LINE, Debtor

Ex parte BAXTER N. FOUST, as Administrator of COY E. FOUST, Deceased, Appellant

v.

MUNSON STEAMSHIP LINE and EDWARD P. FARLEY and MORTON L. FEAREY, Trustees, Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

On Further Rehearing

Per CURIAM:

The appellant's additional brief states that he is unwilling to stipulate that he will not use any judgment, that might be secured in the state court, to prove his claim as administrator against the estate of the debtor. One of the reasons he gives for not so stipulating is that the liability policy contains a deductible clause whereby the insured Munson Steamship Line became self-insurer for the first $2,500 of the claim and "as the value of the Foust claim is not over $5,000 such stipulation would mean that the administrator would relinquish a substantial part of his claim."

In view of the refusal of the appellant to stipulate as above, we must determine whether the District Judge abused his discretion in enjoining the claimant from liquidating his claim in the state court. As the estate of the debtor had a substantial interest in the amount of the recovery, the judge in charge of the section 77B (11 U. S. C. A. § 207) proceeding did not abuse his discretion in promoting that interest and in adopting the mode of liquidating the claim which he selected. That mode was more convenient and expeditious than any other and was plainly an advan-

tage to the estate. If the claim had been fully covered by the insurance so that the carrier was primarily liable for the entire damage, we might have reached a different conclusion; but, under the circumstances, we think the determination of the court below was justified.

Order affirmed.

[fol. 84] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms in the United States Court House in the City of New York, on the 17th day of February, one thousand nine hundred and thirty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

In the Matter of MUNSON STEAMSHIP LINE, Debtor; BAXTER N. FOUST, as Administrator, etc., Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 85] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In Re Munson Steamship Line. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 17, 1936. William Parkin, Clerk.

[fol. 86] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify

that the foregoing pages, numbered from 1 to 85, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of Munson Steamship Line, Debtor; Baxter N. Foust, as Administrator, etc., Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-third day of March, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixtieth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 87] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 27, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,431. U. S. Circuit Court of Appeals, Second Circuit. Term No. 19. Baxter N. Foust, Administrator, etc., petitioner, vs. Munson Steamship Lines, Debtor in Reorganization. Petition for a writ of certiorari and exhibit thereto. Filed March 30, 1936. Term No. 19, O. T., 1936.

FILE COPY

No. [redacted] 19

MAR 30 193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

BAXTER N. FOUST, Administrator, etc.,

Petitioner,

against

MUNSON STEAMSHIP LINE, Debtor in Reorganization,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SIMONE N. GAZAN,
Attorney for Petitioner.

INDEX

THE PETITION:

PAGE

STATEMENT OF THE CASE 1

JURISDICTION 8

QUESTIONS PRESENTED 9

OPINIONS BELOW 11

REASONS FOR GRANTING WRIT 11

CONCLUSION 15

THE BRIEF:

ARGUMENTS:

POINTS I, II, III:

Prior to the enactment of Sec. 77B of the Bankruptcy Law, tort claims, and tort judgments obtained after adjudication, were not provable. Such claims were generally allowed to be liquidated by trial in a court of competent jurisdiction and even since the enactment of Sec. 77B, courts have granted the privilege for such tort claims to be liquidated by trial and the refusal of the court below, to modify the restraining order and permit petitioner's tort claim to be liquidated by trial, was erroneous and a denial of due process of law 19, 20, 21

POINT IV:

The mere definition of "creditors" as the holders of claims of "whatever character" and, furthermore, that final decree shall discharge the debtor from all "debts and liabilities", without a more definite expression of intention to include tort claims, is insufficient to justify holding that tort claims are provable and dischargeable under Sec. 77B 22

POINT V: PAGE

Where the Insurance Law of New York gives a tort claimant the right to recover against the insurance carrier when a judgment against the Insured is returned unsatisfied because of the insolvency of the judgment-debtor, the Court had no right to deny a suit to judgment in order that the tort-claimant may obtain the benefits of such insurance law. The refusal of said right to obtain judgment amounted to a denial of due process of law 23

POINT VI:

The Court below should have decided the legal question presented solely on the record, as made, and not upon any extraneous matter which was not a part of the record and which was not considered by the District Court 25

POINT VII:

The Insurance Law of New York, Sec. 109, offers a tort-claimant security for the payment of a judgment within the terms of the policy but a judgment returned unsatisfied, as required, is a condition precedent to subjecting the policy to the lien of the judgment. The Bankruptcy Law requires a secured creditor to first exhaust his security before claiming against the general assets. Security offered by the Insurance Law can only be determined after judgment obtained and where the Court refuses the claimant the right to obtain such judgment, it thereby denies him the right to obtain the security given him by law and prevents him from establishing any amount to constitute a claim against the general assets 26

CONCLUSION 27

PAGE

Anton, 11 F. Supp. 345 21

Crescent Lumber Co., 154 Fed. 724 19
Chi. Title Co. v. Fox Theatres, 69 Fed. (2d) 60 20

Duignan v. United States, 274 U. S. 195 26

Ex Parte Baldwin, 294 U. S. 610 20

Hatch v. Morosco Holding Co., 19 Fed. (2d) 766 20

James Butler Grocery Co., 12 Fed. Supp. 853 .....13, 21

Kronger Bros. Co., 262 Fed. 463 19
Kline v. Burke Const. Co., 260 U. S. 226 20

Langnes v. Green, 282 U. S. 531 20

Missouri Gas & Elec. Serv. Co., 11 F. Supp. 434 21
Munson Steamship Line, 80 Fed. (2d) 859 ..... 5, 8

Ostrom, 185 Fed. 988 19

Reihle v. Margolis, 279 U. S. 224 20

Sawyer v. Am. Ins. Co., 269 N. Y. 143 7
Schall v. Camors, 251 U. S. 239 .....19, 24
Strouse v. Union Indemnity, 57 Fed. (2d) 528 26

Williams v. Bank of America, 55 Fed. (2d) 885 26

STATUTES CITED

Bankruptcy Act, Sec. 77B (c) (10) 13, 15, 19, 21, 22
Bankruptcy Act, Sec. 57 26
Insurance Law of New York, Sec. 109 ..... 2, 24
Title 11, U. S. C. A., Secs. 29-205j-207 ..... 9, 11, 13
Title 46, U. S. C. A., Sec. 688 9

IN THE

Supreme Court of the United States

OCTOBER TERM 1935.

BAXTER N. FOUST, Administrator, etc.,
Petitioner,

against

MUNSON STEAMSHIP LINE, Debtor in Reorganization,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

On February 1, 1934, Foust, as Administrator, brought suit against Munson Steamship Line to recover damages for the death by wrongful act of Coy E. Foust while a seaman on the American Steamship "Mundelta".

The action was predicated upon the Jones Act and prayed indemnity for the benefit of the father of the deceased.

The defendant duly answered on February 7, 1934, and the case was at issue awaiting trial.

Four months later, to wit, June 11, 1934, the Munson Steamship Line filed its petition for reorganization under Section 77B; on July 13th, following, it was adjudicated in-

solvent; trustees were appointed and a general restraining order granted, under and by the terms of which the prosecution of all pending actions was enjoined.

The Munson Steamship Line carried liability insurance to protect itself against personal injury and death claims.

Under the laws of New York all liability policies must contain a provision that, in the event of the insolvency or bankruptcy of the insured, upon the return of an execution unsatisfied because of such insolvency or bankruptcy, then the judgment-tort-creditor may bring suit on the policy and recover, within the terms of the policy, the amount of the judgment not exceeding the face of the policy.

> "No policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, * * *, and for which loss or damage the person insured is liable, shall be issued or delivered in this state by any corporation or other insurer authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy."
>
> *New York Insurance Law,* Section 109.

Foust was anxious to reduce his claim to judgment by trial in due course so that execution could issue thereon; be returned unsatisfied because of insolvency of judgment-

debtor and, thereupon, to bring suit against the insurance company to recover on the judgment as fully as possible within the terms of the policy.

But he could not proceed with a trial because of the blanket restraining order in the reorganization proceedings and, not desiring to submit his claim for liquidation by a Special Master, filed a motion before Judge ALFRED C. COXE for an order modifying the general restraining order so as to permit Foust to try his pending case in the District Court and obtain a judgment if possible.

Transcript of Record, pages 30-35.

The attention of the court is invited at this time to the fact that there was not a word said in any of the moving papers, or papers in opposition, about there being any deductible clause in the insurance policy whereby, and under the terms of which, the Munson Steamship Line assumed to pay, or became self-insurers, to the extent of the first $2,500.00 of claim, or any other amount.

The terms or provisions of the policy were never mentioned. Judge COXE did not have the policy before him. It was not recited in any of the motions or pleadings. He did not predicate his denial of the motion to modify his restraining order on any provision or recital in the policy. Whether the policy contained any deductible at all was not revealed, and the policy provisions played no part in his refusal to modify the restraining order.

The above facts are important in view of the eventual attitude of the Circuit Court of Appeals.

The modification was refused by Judge COXE and the order stated that a Special Master will be appointed to hear and report if claimant so desires.

Transcript of Record, page 42, folio 125.

The claimant did not want a Special Master. He felt that he had the legal right to a jury trial so he applied

for, and obtained, leave to appeal to the Circuit Court of Appeals but that Court refused to hear argument as to the right to a jury trial and restricted the question it would hear as follows:

> "The briefs and argument will not, therefore, touch the right of trial by jury of the claim in reorganization as to which leave is denied; it will be confined to whether the action can be stayed at all."
>
> *Transcript of Record*, page 63, folio 189.

The briefs in the Circuit Court of Appeals fully presented arguments and authorities on the question indicated and finally, on January 6, 1936, the Court handed down what was called a "deferring decision". This decision held broadly that the power to restrain covered all kinds of actions; that tort claims were dischargeable in reorganization and, were nothing else before the court, the claim should proceed before a Special Master. But the existence of the liability insurance policy and the provisions of Section 109 of the Insurance Law injected a new element into the case. The court *recognized that a judgment against Munson Steamship Line was a condition precedent to recovery against the insurance company,* and that such judgment must be returned unsatisfied. The court correctly held that an order of the bankruptcy court allowing the Foust claim would not be the equivalent of a judgment, because no execution could issue thereon, therefore, no judgment could be returned unsatisfied and hence the condition precedent to suit against the insurance company could not be met.

The decision then proceeds:

> "It would probably simplify matters to allow the action in the state court to proceed. If Foust should recover judgment in that action the execution would be returned 'unsatisfied' and he then could proceed to collect the *whole claim* from the carrier by direct suit

> pursuant to Section 109. But it is common experience that jurors often return far larger verdicts in negligence actions than reason justifies. The trustees of the debtor have a perfect right to take this into account and not accede to a method for the liquidation of the tort claims that is unusual in bankruptcy unless the ordinary proof before a Special Master would imperil the claimant's rights." (Italics ours.)

It will be noted that throughout the opinion the court said nothing about any deductible clause or any self-insurance by the debtor but, on the contrary assumes—as necessarily it must have at that time—that the policy would have to be *fully paid* by the insurance carrier. The court even conjectures about the possibility of a separate suit by Munson Line against the insurance carrier to recover any dividend which might be paid to Foust from its assets, thus showing that nothing about a deductible clause was before the court, as of course it was not.

The court then made this unusual proposition to Foust:

> "If Foust is willing to stipulate not to use any judgment he may recover in the state action as a claim against the estate there could be no objection to allowing the action to proceed to judgment * * *. But if such stipulation is not filed by the appellant within three days, supplemental briefs shall be filed within ten days thereafter relating to the propriety of the exercise of the judicial discretion of the District Court, whereupon we shall determine whether the stay ought to stand in the absolute form in which it was granted."

For opinion in full see,

In re: *Munson S.S. Line*, 80 Fed. (2d) 859.

Foust then had a problem to solve. He could have his jury trial if he would stipulate not to file any claim based upon his judgment against the debtor's estate, but he had three very good reasons for not so stipulating and he set them forth in his supplemental brief as follows:

1. Foust was granted only limited letters of administration which restricted his authority to the mere prosecution of the action. He had no right to enter into such a stipulation.

2. Under the policy the Munson Line was self-insurer for the first $2,500.00 of any claim and, as the value of the Foust claim would probably not exceed $5,000.00, such stipulation would mean that Foust would have to abandon a substantial part of his claim.

3. Under the terms of the policy the insurer became subrogated to all rights of insured and, if Foust should waive his right to collect *pro tanto* from the debtor, then such waiver might operate to entirely release the insurer.

Here in this supplemental brief was the *first mention* of the $2,500.00 deductible. It was simply stated as a possible reason for not stipulating to file no claim against debtor based on any judgment obtained. It was no part of the record as made. It was not before Judge Coxe. It was not known to the Circuit Court of Appeals when it handed down its "deferring decision".

It was a statement *de hors* the record. It was made because we did know that in another case such a policy which was issued to Munson Line did have that deductible clause, and it was merely assumed that the present policy was similar in its conditions and terms. Neither Foust nor his attorney had ever seen the policy.

As a matter of fact we had always believed that the deductible provision of the policy was void as contrary to Section 109 of the Insurance Law, and we argued that proposition before the New York Court of Appeals last fall.

The "deferring decision" of the Circuit Court of Appeals was handed down on January 6, 1936. It was two days later, to wit, on January 8, 1936, that the Court of Appeals

handed down its decision holding the deductible clause to be valid.

Sawyer v. *Am. Ins. Co.*, 269 N. Y. 148.

It was not until that decision was rendered that we knew that the deductible of $2,500.00 was a claim against Munson Steamship Line, and it was in that knowledge that the deductible was assigned as one of the reasons for not stipulating to waive any claim against the debtor.

We were somewhat surprised, therefore, when the Circuit Court of Appeals seized upon that deductible clause as a justification for the refusal of Judge COXE to modify the restraining order when the existence of such a clause had never been brought to Judge COXE's attention, and no mention was made of it in the opposition papers and affidavits on behalf of the Trustees. Such a reason was not assigned by Judge COXE to justify his refusal to let the tort case proceed to trial and the decision of the Circuit Court has written a fact into the record which was not there when Judge COXE heard and passed upon the *motion*; was not there when leave to appeal was asked; was not there when the briefs were prepared or when the case are argued. It was not there when the court, in its "deferring opinion" on January 6th, 1936, said:

> "Now the condition of liability of the insurance company under the policy will only be fulfilled if a judgment is recovered by the claimant and an execution thereon is returned unsatisfied. It is somewhat doubtful whether an order of the bankruptcy court allowing Foust's claim would be the equivalent of the execution required by section 109 of the Insurance Law, for an execution never issues out of that court, at least in a literal sense. But, even if an order of the bankruptcy court allowing the claim could be said to be the equivalent of an execution, the question would arise whether Foust, after receiving from the Munson Steamship Line whatever dividend might be paid him under the plan

of reorganization, would be able to recover the balance of his claim from the carrier to the extent that such balance, plus what he had received as a dividend, did not exceed the face of the policy. This would depend on whether the words 'returned unsatisfied' in section 109 not only means 'wholly' but also 'partially unsatisfied.' The latter meaning of 'unsatisfied" would subject the carrier to two actions, one by the insured Munson Line to recover the dividend paid and the other by Foust for any balance not in excess of the policy. It may be argued with some, though not altogether convincing, force that such twofold causes of action are not authorized by section 109. It would probably simplify matters to allow the action in the state court to proceed. If Foust should recover judgment in that action, the execution would be returned 'unsatisfied,' and he then could proceed to collect his whole claim from the carrier by direct suit pursuant to section 109."

In re: Munson S.S. Line, 80 Fed. (2d), at page 861.

The above language is a clear indication that the idea of a deductible clause was not then in the mind of the court.

Nevertheless, when Foust refused to abandon any claim against the debtor as the price for obtaining the right to a trial, which refusal was based upon good and sufficient legal reasons, the Circuit Court of Appeals denied him the permission to try his case in quest of a judgment which was a condition precedent to proceeding against the insurance carrier, and approved and affirmed Judge COXE'S refusal to modify the stay.

Jurisdiction

The decision and judgment of the Circuit Court of Appeals was entered on February 10, 1936.

The jurisdiction of the Court is provided by Section 347 of Title 28 of the United States Code.

An interpretation of Sections 11 and 77B of the Bankruptcy Act (Title 11, U. S. C. A., Secs. 29 and 207), is directly involved.

The Jones Act (Title 46, U. S. C. A., Sec. 688), and the Railroad Reorganization Act (Title 11, U. S. C. A., Sec. 205j), are also presented for construction.

Questions Presented

1

Where a state statute incorporates into every policy of liability insurance delivered in the state, a provision that in the event of the bankruptcy or insolvency of the insured, a judgment-creditor, upon return of the execution unsatisfied because of bankruptcy or insolvency, may recover in a direct suit against the insurance carrier, and the insured defendant seeks reorganization under 77B, and is adjudged to be insolvent, should a general restraining order of the court be modified on application of the tort claimant, whose suit was pending at the time of adjudication, so as to permit the case to be tried, and a judgment obtained, as preliminary to proceeding against the insurance carrier?

2

Assuming that the tort judgment, when obtained, would be dischargeable under ordinary conditions, but with the insurance policy available to the judgment-creditor when execution is returned unsatisfied, as required, did the court have the right, or the discretion, to deny Foust the opportunity to obtain a judgment simply because "jurors often return far larger verdicts in negligence actions than reason justifies," as Judge AUGUSTUS N. HAND phrased his justification, when, under the practice in both state and federal courts in New York, the presiding Judge supervises

verdicts, and may set aside an unreasonable verdict or effect a reduction in any verdict he deems excessive, and otherwise mould verdicts to keep them fair and reasonable?

3

Prior to the enactment of Section 77B tort claims were not provable in bankruptcy, nor were tort judgments, rendered *after* adjudication, provable in bankruptcy. The Corporate Reorganization Act retained the provisions of Section 63 of the Bankruptcy Act as to the provability of claims, but in the new Section 77B defined creditors as "all holders of claims of whatever character" and also provided that final decree shall discharge from all "debts and liabilities." Was it the intention of Congress by such general language to change the pre-existing law, and, by implied rather than by express terms, include tort claims or tort judgments as dischargeable?

4

Where a state statute gives a right of action to a judgment-tort-creditor against an insurance carrier, when certain conditions precedent have been met, and a federal court refuses to modify a restraining order so as to permit those conditions precedent to be complied with, to-wit, by allowing the action to proceed to trial and a judgment obtained, and where the trial of said action would in no way impede, hinder, delay, harass or embarrass the orderly progress of the reorganization, and where the levy of an execution on any of debtor's assets could be controlled by the court, was the effect of such refusal to modify the restraining order to deprive the claimant of a substantial legal right, amounting to a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States?

5

Where the action is to recover indemnity for the death of a seaman, under the Jones Act of Congress, and the Jones Act adopts, by reference, the provisions of the Federal Employers' Liability Act, and where the Railroad Reorganization Act (Title 11, U. S. C. A., Sec. 205j), provides that actions for tort arising out of operations shall not be stayed, or if already stayed, the stay to be vacated, do seamen, by virtue of the Jones Act, come within the purview and intendment of said provision?

Opinions Below

The Circuit Court of Appeals wrote two opinions. The first, called the "deferring opinion", was handed down on January 6, 1936, and is reported in 80 Fed. (2d) 859.

The final opinion was handed down February 10, 1936, and as yet not reported.

The District Court (Judge COXE) wrote no opinion but on January 20, 1935, entered this memorandum:

> "The motion is denied with permission to go before a Master and adjudicate the claim if the claimant so desires."

Reasons for Granting the Writ

1

The claimant has been denied the right to obtain a judgment and thereby to enable him to proceed against the insurance carrier to collect under the policy as authorized by the Insurance Law. While the matter of allowing a court trial may be discretionary with the court the discretion is a legal one and not an arbitrary one, and where the orderly administration of the estate will not be affected

by such trial, and even the defense of the action will fall upon the insurance company and not upon the Trustee, to deny such trial simply because the jury may give a more generous award than a Special Master, is not a sufficient ground, and amounts to an abuse of discretion.

2

The Munson Steamship Line protected itself by liability insurance. The Insurance Law of New York wrote into that policy a provision that if a judgment is obtained against the insured, and execution thereon should be returned unsatisfied, because of insolvency or bankruptcy of insured, then the judgment-creditor may recover in direct action against the insurance company.

Neither before Judge COXE in the District Court nor before the Circuit Court of Appeals were the terms or provisions of that policy mentioned or disclosed. Judge COXE decided the motion without knowing whether the policy contained a deductible clause or not. The "deferring opinion" of the Circuit Court of Appeals was not predicated upon any such policy provision.

Furthermore, the court should not have seized upon that extraneous statement about the deductible to justify Judge COXE, when such fact was not even considered by Judge COXE. Indeed it was not known to him. Judge COXE should be sustained or reversed *on the record which moved his decision.*

We contend that to deny Foust the right to a jury trial because of that clause, and thereby prevent him from recovering any amount in excess of that deductible from the insurance company, is a denial of justice.

3

There is an inconsistency between Section 63 of the old Bankruptcy Act and the provisions of Section 77B in respect of the kind and character of claims dischargeable, and

also an inconsistency between the established law that a tort claim may be liquidated by trial before a court of competent jurisdiction, and clause c (10) of 77B, which provides that the Judge "may enjoin or stay the commencement of suits against the debtor until after final decree."

See

In Re: James Butler Grocery Co., 12 Fed. Supp. 851.

The apparent inconsistencies and conflicts should be reconciled, if possible, but failing that, a definite determination should be made as to when and why a claimant may be deprived of his right to a trial.

4

The tort action was brought under the Jones Act to recover damages for the death of a seaman. The Jones Act adopted in favor of seamen the provisions of the Federal Employers' Liability Act, and thereby seamen were placed in the same category as railroad employees.

Under the Railroad Reorganization Act, Title 11, U. S. C. A., 205j, it is expressly provided that suits for damages arising out of the operations shall not be stayed, and any order of stay shall be vacated. There is no similar provision in Section 77B, neither is there any express provision therein about tort claims, but we contend that seamen became beneficiaries of that provision of the Railroad Reorganization Act because they are, in legal contemplation, in the same class as railroad employees. The determination of this question is a good reason for granting the writ.

5

Assuming that the broad language of 77B does include tort claims under "debts, securities other than stock, liens or other interests of whatever character," and are discharge-

able by decree in reorganization, still the method of reducing such claims to a sum certain is quite doubtful. They could be liquidated before a Referee or Special Master. They could be liquidated by permitting pending actions to be prosecuted. If an action is pending, defended by an insurance company, would a court be justified in staying such trial and ordering proof to be made before a Master, at large expense to the debtor's estate for witnesses, stenographic charges and attorneys' fees, when the trial in court of the pending action would impose no expense whatever on the debtor's estate? Would not the supposed saving through a possibly smaller award from a Special Master be off-set by the added expense of trial costs and fees? And would such speculative smaller award be sufficient to deprive a tort claimant, particularly a seaman, of a jury trial?

And if reorganization proceedings could deprive injured employees or injured third parties, of a jury trial, could not corporations resort to reorganization purposely to defeat the very important right of a jury trial in determining disputed questions of fact and in assessing the damages in cases where the claims are many and substantial?

These considerations present a reason for the granting of the writ so that these questions may be answered.

6

The Insurance Law of the State of New York, Section 109, provides that insolvency or bankruptcy of the insured shall not release the insurance carrier from liability under the policy and provides, further, that in case execution against the insured is returned unsatisfied because of insolvency, then a direct action may be maintained against the insurance carrier by the judgment-creditor "under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy."

This statute makes it possible, by the mere obtaining of the judgment and having the execution returned unsatisfied as required, for Foust to become a secured creditor to the amount recoverable under the policy.

Under Section 77B a secured creditor's rights are governed by Section 57, clause h, of the Bankruptcy Act, and this section provides that the secured creditor must *first exhaust his security* before claiming against the general estate.

Foust's security is not in marketable stocks or bonds with an easily ascertainable value. His is a contingent security based upon a *cause of action* and a judgment is indispensable to convert that contingency into a vested right, and not only to bring that right into existence, as such, but to fix and determine its value by the assessment of damages.

Foust must first obtain a judgment against Munson Line. Then have the execution thereon returned unsatisfied because of the insolvency of the Munson Line. Then, and not until then, can he sue the insurance company. And not until the insurance company is sued will the amount, provisions and limitations of the policy be revealed.

How can Foust establish or exhaust his security unless he be granted the necessary permission to obtain the prerequisite judgment?

The Circuit Court of Appeals recognized that an award of a Special Master is not the equivalent of a judgment because no execution can issue thereon, yet it denied Foust the right to obtain a judgment! Was this decision proper?

Conclusion

Foust has been denied the very important and valuable right of a jury trial. We concede the power of the court to restrain actions which would create a preference, dissipate assets, or impede, harass or embarrass the court in the orderly administration of the reorganization, but merely

to permit a pending case to be tried in regular course, and a judgment obtained, if possible, in order to qualify the claimant to recover against an insurance company, seems a denial of due process and the abuse of legal discretion.

Juries sometimes are overly generous. The award of Special Masters and Referees are often inadequate. But in this particular case proper regard for economy in handling the debtor's estate would dictate that the suit, already pending and defended by the insurance company, should continue to be defended at the expenses of the insurance company rather than, by reference to a Special Master, have the attorneys for the Trustees defend and charge their fees, plus expenses of the trial, against the debtor.

Prior to the enactment of Section 77B tort claims were regarded as a thing apart from debts. Tort claims were not provable and tort judgments, obtained *after* adjudication were not dischargeable. Section 77B enlarged the old statute by defining a creditor as one having a claim of whatever character and that final decree should discharge the debtor from all "debts and liabilities," language sufficiently broad to include tort claims if considered apart from the generally accepted law, but it seems strange that the Congress, if intending to include tort claims, would not have expressly so stated. The failure to distinctly mention tort claims would leave the word "liabilities" to cover every conceivable civil claim arising from matters *ex contractu* or quasi-contractural, and this view is emphasized by the special provision that if reorganization fails, and liquidation is ordered in bankruptcy, then tort claims may be proved when "evidenced by the judgment of a court of competent jurisdiction." That language presumes a court trial and we cannot conceive that a claimant would be allowed a trial to liquidate a tort claim in bankruptcy and be denied that right in reorganization.

We feel, therefore, that under all the circumstances, this Court should review the findings and make a disposition

more conformable to law and justice, all of which considerations merit the grant of the writ of certiorari.

Respectfully submitted,

SIMONE N. GAZAN,
Attorney for Petitioner.

Dated, New York, March 24, 1936.

I hereby certify that I have examined the foregoing petition, and in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

SIMONE N. GAZAN.

IN THE

Supreme Court of the United States

OCTOBER TERM 1935.

BAXTER N. FOUST, as Administrator,
Petitioner,

against

MUNSON STEAMSHIP LINE, Debtor in Reorganization,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

POINT I

Prior to the enactment of Section 77B tort claims were not provable in bankruptcy, and tort judgments, obtained after adjudication, were not provable.

"Unliquidated claims arising *ex delicto* are not provable in bankruptcy."

Schall v. *Camors,* 251 U. S. 239.

"Judgment based on pure torts are not provable if obtained after the filing of the petition."

Schall v. *Camors,* 251 U. S. 239;
Re: Crescent Lumber Co., 154 Fed. 724;
Re: Ostrom, 185 Fed. 988;
Re: Kronger Bros. Co., 262 Fed. 463.

POINT II

Prior to the enactment of Section 77B courts generally allowed claims to be liquidated before a court of competent jurisdiction.

> "There is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which controls the *res*. It is only necessary that in the receivership proof of claim be made in an orderly way so that it may be established who the creditors are and the amounts due them."
>
> *Reihl* v. *Margolis*, 279 U. S., at page 224;
> *Langnes* v. *Green*, 282 U. S. 531;
> *Chi. Title Co.* v. *Fox Theatres*, 69 Fed. (2d) 60(4), (Second Circuit).

If the state court suit merely seeks judgment *in personam* and will not affect the property taken under the federal receivership, the two proceedings may go on concurrently.

> *Hatch* v. *Holding Co.*, 19 Fed. (2d) 766 (Second Circuit). Affirmed *Reihle* v. *Margolis*, 279 U. S. 218;
> *Kline* v. *Burke Const. Co.*, 260 U. S. 226.

And if further citation be needed to establish the principle we cite the recent expression of this court:

> "Moreover, the bankruptcy court might, in the exercise of its discretion, conclude that it is desirable to have the litigation proceed in the state court."
>
> *Ex parte Baldwin*, 294 U. S. 610.

POINT III

Even since the enactment of Section 77B courts recognize the right of litigants to have their claims liquidated by regular trial in court, if the orderly administration of the debtor's estate be not interfered with.

"Assuming that the court should direct in some manner the liquidation of unliquidated claims, then there is no reason why the court should not follow the established practice of permitting same to be done in a state court. Particularly is this true where a suit has already been instituted and is now pending."

In Re: Missouri Gas & Electric Service Co., 11 Fed. Supp. 434.

"The claimant who insists upon his constitutional right to a jury trial would do well to reflect that while the court may not be empowered to deprive him of that right, it can control the time for the presentation and allowance of claims and the application of the debtor's property thereto. * * * These considerations yield the view that, while a tort claimant may not be stayed from liquidating his claim in a state court action, expediency will ordinarily divert him from that course."

In Re: James Butler Grocery Co., 12 Fed. Supp. 853.

"Creditor having commenced suit on valid and provable debt before debtor's adjudication in bankruptcy, may prosecute suit to judgment and prove such judgment in bankruptcy proceedings."

In Re: Anton, 11 Fed. Supp. 345 (5), and cases cited.

POINT IV

If Congress had intended to include tort claims among debts and liabilities, thereby to effect a change in the established law and practice, it would have done so in express language.

In Section 77B, (b), (10), Congress undertook to define creditors and claims as used in the Act, and said:

> "The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or his property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act."

The language "claims of whatever character" is certainly sweeping and all-embracing and, without more, could be interpreted as including tort claims. But Congress immediately proceeded to limit the broad expansiveness of "claims of whatever character" by a definition of "claims" as follows:

> "The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character."

It is apparent that the *debts* in contemplation were those arising *ex contractu* or from commercial transactions, and the context shows that tort claims were not in the same class or *genera* of "debts, securities * * * or other interests of whatever character."

Furthermore, after including under "creditors" all holders of "claims of whatever character" the Congress deemed it necessary to step beyond this comprehensive generalization by adding *"including claims under executory contracts"* thereby confirming the thought that civil, contractual obligations were intended.

Had the Congress intended to make so radical a change in the extant law as to include the theretofore excluded tort claims, would not the Act have added after "including claims under executory contracts" some positive, emphatic expression like "and tort or other claims arising *ex delicto*?"

And in defining "claims" to include "debts, securities * * *" would not the lawmakers have expressly said something like "debts, *tort or negligence claims for injury or death,* securities, etc.," if there had been the purpose to depart from long established rules and practice and include tort claims?

And in providing for a final decree discharging the debtor from all "debts and liabilities" the word "liabilities" in the context manifestly refers to such as arise from obligations of a civil nature rather than those of tortious origin. Even that one word is not sufficient upon which to predicate an intention to include tort claims without some clear language evidencing such intention. It cannot be done by implication or supposition. Decisions which have been law for many years, and the statute law, cannot be changed or amended or repealed by hint or generalities.

Seems like the Act studiously avoided the mention of tort claims in reorganization for under Clause 6½ of Section 63 of the Bankruptcy Act it was expressly provided that tort claims may be evidenced by "a judgment of a court of competent jurisdiction." Its silence about tort claims in reorganization proceedings while providing for them if reorganization fails and liquidation in bankruptcy ensues, would seem to indicate a resolve to leave the existing law and practice in receiverships unchanged.

> "Evidently the words of the section were carefully chosen; and the express mention of contractual obligations naturally excludes those arising from a mere tort. Since claims founded upon an open account or upon a contract, express or implied, often require to be liquidated, some provision for procedure evidently was

called for. Clause b fulfills this function, and would have to receive a strained interpretation in order that it should include claims arising purely *ex delicto*. Such claims might easily have been mentioned if intended to be included."

Schall v. *Camors*, 251 U. S. 251.

POINT V

The Insurance Law of New York creates a right of action in favor of a judgment tort creditor against the liability insurance carrier, if a judgment is recovered against the insured, and execution thereon is returned unsatisfied because of insolvency of insured, to collect the judgment within the terms and to the amount of the policy. To deny tort claimant the right to reduce his claim to judgment as preliminary to making said insurance law available to him, is not only an abuse of discretion but the affirmative denial of due process of law.

Whatever may be the position generally of a mere tort claimant under Section 77B, the New York Insurance Law, Section 109, creates a right of recovery, or security, in his favor, and all he requires is a judgment to make that insurance law available to him. Armed with a judgment, properly returned unsatisfied, he would be relieved from the position of a mere general creditor, if such he be, and given a conditional security, subject to be made absolute by the expedient of such judgment.

This security is a valuable right to the tort claimant, and may be his only possible means of collecting anything on his claim. It is a substantial property right. It is like good collateral. It is a guaranty of payment. The obtaining of the judgment will not impede, hinder or embarrass the orderly progress of the reorganization proceedings, and if judgment is obtained and any effort should be made to levy it on any of debtor's assets, an injunction would prop-

erly issue to stop it. This, however, is most unlikely because the existing restraining order enjoins all sheriffs and marshals from levying any execution or judgment on debtor's assets.

We contend that to deny such tort claimant the privilege and opportunity to obtain the benefit of that insurance law is to deny him due process of law.

POINT VI

The Circuit Court of Appeals should have decided the broad question of right to a trial for liquidating the tort claim solely upon the record as made before the District Court, and not to have decided the question on an extraneous statement made as a possible reason for not waiving a substantial right.

We have hereinbefore shown that the terms of the insurance policy was not a part of the motion papers before Judge COXE. These policy provisions were not before the Circuit Court of Appeals. All that the motion papers or record disclosed to either court was the substantive fact that a liability policy was in force.

In justifying and explaining his refusal to stipulate that he would not file any claim against debtor's estate, based on the judgment, as the sacrifice for obtaining authority to proceed to trial, claimant stated that the policy contained a deductible or self-insurance clause whereby the insurer (debtor) assumed to pay the first $2,500.00 of claim, and that Foust, as Administrator, under limited letters, had no authority to waive so substantial a part of the claim.

We do not think that Foust should have been put in such an embarrassing position, or that he should be penalized by losing his insurance security simply because he refused to enter into a stipulation deemed by him to be beyond his authority. He sought the legal right to subject

that policy to the lien of his claim, and we submit that this legal question, raised on the record, should have been decided on the record and on its merits, divested of such foreign considerations as deductible clauses and the possibility that a jury might award an excessive amount. The court under its rules had no right to decide a question not passed upon by the court below.

Williams v. *Bank of America,* 55 Fed. (2d) 885 (12);

Strouse v. *Union Indemnity,* 67 Fed. (2d) 528 (8).

See

Duignan v. *United States,* 274 U. S. 195.

POINT VII

By the Insurance Law of New York, Section 109, Foust could become a secured creditor by first obtaining a judgment against debtor, and the Court erred in refusing him the right to proceed to trial.

The liability insurance policy is a potential security for Foust's claim. The New York Insurance Law is applicable law. The policy was issued and is in full force and effect. The insured has been adjudicated insolvent and such insolvency will justify and support a Marshal's return of unsatisfied because of insolvency. All that Foust needs to make that policy subject to his claim is a judgment. With that, and the execution issued thereon returned unsatisfied as required, and immediately he becomes a creditor holding security.

Under the Bankruptcy Act before a secured creditor can claim anything against general assets he must first apply the security to the liquidation of his claim.

Section 57, Bankruptcy Act, subdivisions e and h.

Foust's security is the insurance policy. What amount he can realize on that can only be determined by suit on

the policy when its terms, conditions and amount will be revealed. If there is a deductible the amount of it will then appear, and if the judgment should exceed the deductible, then the amount payable by the insurance carrier will be known as well as the balance which will form a claim against the debtor's estate.

The Circuit Court of Appeals committed error in denying Foust the privilege of proceeding against the policy to have the value of his security established and to have the amount for which the debtor's estate will be liable fixed and determined.

A suit to judgment is the only method by which the policy could be subjected to the payment of the Foust claim, in whole or in part. That's the only way he could exhaust his security as preliminary to claiming against the debtor.

Conclusion

We have presented several questions which arise out of the peculiar situation which developed in this case. We have named several reasons why the writ of certiorari should be granted. In the Brief we have stressed the outstanding legal propositions which we think justify the favorable consideration of this Court.

Altogether, we think the record presents such gross errors of law, such a denial of justice and such needed interpretations of the Corporate Reorganization Act, and pertinent allied statutes applicable to seamen, as to merit the grant of the writ herein prayed for.

Respectfully submitted,

SIMONE N. GAZAN,
Attorney for Petitioner.

PRESS OF FREMONT PAPER, INC.

[14892]

Office - Supreme Court
FILED
OCT 7 193
CHARLES ELMORE C
CL

IN THE

Supreme Court of the United States

OCTOBER TERM—1936.

No. 19.

BAXTER N. FOUST, Administrator, Etc.,
Petitioner,

vs.

MUNSON STEAMSHIP LINES, Debtor in Reorganization,
Respondent.

—o—

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

SIMONE N. GAZAN,
One Broadway,
New York City,
Counsel for Petitioner.

INDEX.

	PAGE
The Opinions of the Court Below	1
Statement of the Case	2
Specification of Errors	9
Argument	11
POINT ONE.—Sec. 77B did not change the law that tort claims reduced to judgment after adjudication of insolvency, were not provable and it was error to deny the tort claimant the right to try his case in court	11
POINT TWO.—The Court erred in requiring Foust, as a condition precedent to obtaining a trial, to stipulate and agree that no part of any judgment obtained would form the basis of any claim against the Debtor	18
POINT THREE.—Since, under the Insurance Law of New York, a judgment-tort-creditor, when execution is returned unsatisfied because of insolvency of insured, could bring a direct suit against the insurer, the court erred in denying Foust the right to obtain a judgment with the view to making collection under the policy	20
POINT FOUR.—Disregarding the said New York Insurance Law, and assuming that it does not apply against marine risks, still Foust, as donee beneficiary under the policy, had a common law right to obtain judgment against Munson Line and thereupon sue directly on the policy, unaided by the Insurance Law, and he should not have been deprived of that right	22

PAGE

POINT FIVE.—The Circuit Court erred in predicating its affirmance of the district court upon a fact which was not in the record and which was not passed upon by the lower court 23

POINT SIX.—The Jones Act of Congress gave seamen the right to elect a jury trial and the court administering the reorganization act had no right to deny and deprive Foust of a jury trial to fix the amount of his claim 25

POINT SEVEN.—The Federal Employers' Liability Act and the Jones Act, which incorporated the former act by reference, are *in pari materia*, and the privileges and exemptions given the tort claims of railroad employees by the Railroad Reorganization Act apply to seamen who, under the Jones Act, are put in the category of railroad employees 27

CONCLUSION 30

TABLE OF CASES CITED.

Argyle-Lake Bldg. Corp., 78 Fed. (2d) 491 (3) ... 30
Austin *v.* Seligman, 18 Fed. 519 22

Baldwin, *ex parte*, 29[illegible] U. S. 610 12
Barton *v.* Barbour, 104 U. S. 126 12
Board of Commissioners *v.* Aetna Ins. Co., 90 Fed. 222 29

Chi. Title Co. *v.* Fox Theatres, 69 Fed. (2d) 60 (4) 12, 17
Colton Co., Matter of Wendell P. *v.* N. Y. & Cuba Mail Steamship Co. 12

Duignan *v.* United States, 274 U. S. 195 24

PAGE

Elrod *v.* Moss, 278 Fed. 124 (6) 29
Engel *v.* Davenport, 271 U. S. 33 27

Fay Stocking Co. in re, 10 Fed. Supp. 968 (2) 18

Graham *v.* U. S. F. & G. Co., 308 Pa. 534 22

Hatch *v.* Holding Co., 19 Fed. (2d) 766 12
Hendrick *v.* Lindsey, 93 U. S. 143 22
Hill *v.* Harding, 130 U. S. 699 23

Ivanhoe *v.* B. & L. Assn. *v.* Orr, 295 U. S. 243 19

James Butler Grocery Co., in re, 12 Fed. Supp. 853 17

Kline *v.* Burke Const. Co., 260 U. S. 226 12

Langes *v.* Green, 282 U. S. 531 12
Lawrence *v.* Fox, 20 N. Y. 208 22

Manfg. Finance *v.* Vye-Neill Co., 62 Fed. (2d) 625 23
Miller *v.* Collins, 40 S. W. (2d) 1062 23
Missouri Gas & Electric Co., in re, 11 Fed. Supp. 434 16
Munson Steamship Line, in re, 80 Fed. (2d) 859 .. 1, 6, 9
Munson Steamship Line, in re, 82 Fed. (2d) 289 .. 1

Panama Railroad *v.* Johnson, 264 U. S. 375 27
Panama Railroad *v.* Vasquez, 271 U. S. 561 29

Reihl *v.* Margolis, 279 U. S. 224 12
Rohrer *v.* Hastings Brew. Co., 83 Neb. 112 (3) ... 29
Rose *v.* Zurich Ins. Co., 296 Pa. 206 22

Sawyer *v.* Amer. Ins. Co., 269 N. Y. 148 7
Scararigello *v.* Pacione, 70 Misc. (N. Y.) 211 29
Schall *v.* Camors, 251 U. S. 239 ..... 11, 16
Sentinel Oil Co., in re, 12 Fed. Supp. 294 17
Strouse *v.* Union Indem. Co., 67 Fed. (2d) 528 (8) 24

Tiger *v.* Western Inv., 221 U. S. 306 29

United States *v.* Jefferson Elec. Co., 291 U. S. 386 30

PAGE

Vane *v.* Newcombe, 132 U. S. 235 30

Wexler *v.* Davis, 286 Mass. 142 23
Williams *v.* Bank of America, 55 Fed. (2d) 885 .. 24

STATUTES CITED.

Insurance Law of New York, Sec. 109 3
Title 11, U. S. C. A. Sec. 103 (6½) 13
Title 11, U. S. C. A. Sec. 202 17
Title 11, U. S. C. A. Sec. 205b 17
Title 11, U. S. C. A., Sec. 205j 28
Title 11, U. S. C. A. Sec. 205n 28
Title 28, U. S. C. A. Sec. 41 (3) 25
Title 46, U. S. C. A. Sec. 688 25

AUTHORITIES.

Annotations, 81 A. L. R. 1279 23
39 Yale Law Journal 601 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 19.

BAXTER N. FOUST, Administrator, etc.,
Petitioner,

AGAINST

MUNSON STEAMSHIP LINE, Debtor in Reorganization,
Respondent.

BRIEF FOR PETITIONER.

The Opinions of the Court Below.

There was no opinion by the district judge, but on January 20th, 1935, he entered the following memorandum:

> "The motion is denied with permission to go before a master and adjudicate the claim if the claimant so desires."

The Circuit Court of Appeals wrote two opinions. The first, called the "deferring opinion", was handed down on January 6th, 1936 (R., 47), and is reported in 80 Fed. (2d) 859.

The final opinion was handed down February 10th, 1936, (R., 53) and is reported in 82 Fed. (2d) 289.

Statement of the Case.

On February 1st, 1934, Foust, as administrator, brought suit against the Munson Steamship Line to recover indemnity under the provisions of the Jones Act for the death by wrongful act of Coy E. Foust, a merchant seaman, who lost his life on the American Steamship *Mundelta*. The action was brought for the benefit of the father of the deceased who suffered pecuniary loss by reason of his son's death.

The defendant duly answered on February 7, 1934, and the case was at issue and upon the calendar of the court awaiting its turn to be tried.

On June 11, 1934, which was some four months after this death action was commenced, and before the case could be reached in regular order for trial, the Munson Steamship Line filed its Petition for Reorganization under Section 77B, and on July 13th, 1934, it was adjudicated insolvent; trustees were appointed and a general restraining order granted, under and by the terms of which the prosecution of all pending actions was stayed.

It is noteworthy that in the petition for reorganization *not a single tort claim* was mentioned, nor was *a single action to recover damages for tort* named by the petitioner. Its recital of liabilities does not list a single claim arising *ex delicto* (R., 8-10). The only pending litigation mentioned in the petition is an action *ex contractu* brought in the Supreme Court of New York by the G. & B. Marine Repair Company (R., 11).

It may be that the omission of all tort claims or tort actions was due to the realization on the part of the petitioner that such claims were not provable or dischargeable in reorganization, or to the fact that the Debtor carried liability insurance to protect itself against personal injury and death claims, and that, therefore, such claims were the concern only of the insurance carrier.

However, no tort action, either threatened or pending, was mentioned in the petition, and we conclude that the

sweeping restraining order of the district court contemplated the restraint only of such actions as were recited or which might be commenced by any listed creditor and which might impede, embarrass or complicate the orderly proceedings incident to the reorganization.

Under the laws of the State of New York, all policies of liability insurance, issued or delivered in that state, must contain a provision that, in the event of the insolvency or bankruptcy of the insured, upon the return of an execution unsatisfied because of such insolvency or bankruptcy, then the judgment-tort-creditor may bring suit on the policy and recover, within the terms of the policy, the amount of the judgment not exceeding the face value of the policy. The following is the language of the statute:

> "No policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, * * *, and for which loss or damage the person insured is liable, shall be issued or delivered in this state by any corporation or other insurer authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy."
>
> New York Insurance Law, Section 109.

Foust was anxious to reduce his claim to judgment by trial in due course so that an execution might issue and

be returned unsatisfied because of the insolvency of the defendant, the Munson Steamship Line, and thereupon, by virtue of the said statute, to bring suit directly against the insurance company to recover on the judgment as fully as possible within the terms of the policy.

But he could not proceed with a trial because of the general restraining order in the reorganization proceedings and, not desiring to submit his claim for liquidation before a Special Master, moved the district court to grant an order modifying the general restraining order so as to permit Foust to try his pending case in the District Court with a view to obtaining a judgment, if possible (R., 20).

The modification prayed for was refused by Judge Alfred C. Coxe, who issued the original restraining order, but he provided that a Special Master would be appointed to determine the Foust claim, if desired (R., 26).

The claimant, Foust, did not want a Special Master. He felt that he had a legal right to a jury trial so he applied for and obtained leave to appeal to the Circuit Court of Appeals, but that Court refused to hear argument as to the right to a jury trial and restricted the question which it would hear, as follows:

> "The briefs and argument will not, therefore, touch the right of trial by jury of the claim in reorganization as to which leave is denied; it will be confined to whether the action can be stayed at all" (R., 37-38).

The briefs and argument in the Circuit Court of Appeals were therefore confined to the narrow and only question which the Court granted leave to present, but when the Court reached the consideration of the question, it realized that the restriction would have to be lifted and other questions entertained, and so, on January 6, 1936, the Court handed down what was called a "deferring decision". This decision held broadly that the power to restrain covered all kinds of actions; that tort claims were

dischargeable in reorganization and, were nothing else before the court, the Foust claim should proceed to liquidation before a Special Master. But the existence of the liability insurance policy and the said provisions of Section 109 of the Insurance Law injected a new element into the case, which required consideration. *The court recognized that a judgment against Munson Steamship Line was a condition precedent to recovery against the insurance company,* and that such judgment must be returned unsatisfied. The court correctly held that an order of the bankruptcy court or the award of a Special Master, liquidating the Foust claim, would not be the equivalent of a judgment because no execution could issue thereon, and therefore, no execution could be returned unsatisfied, and, consequently, this condition precedent to suit upon the insurance policy could not be performed.

The decision then continues (R., 51):

> "It would probably simplify matters to allow the action in the state court to proceed. If Foust should recover judgment in that action, the execution would be returned 'unsatisfied' and he then could proceed to collect the *whole claim* from the carrier by direct suit pursuant to Section 109. But it is common experience that jurors often return far larger verdicts in negligence actions than reason justifies. The trustees of the debtor have a perfect right to take this into account and not accede to a method for the liquidation of the tort claims that is unusual in bankruptcy unless the ordinary proof before a Special Master would imperil the claimant's rights." (Italics ours.)

We invite the court's attention to the fact that throughout the opinion of the Circuit Court nothing was said about any deductible clause in the insurance policy or any self-insurance by the Debtor under the terms of the policy, but on the contrary assumed—as necessarily it must have upon the record—that the judgment would have to

be *fully paid* by the insurance carrier. The court even conjectures about the possibility of a separate suit by the Munson Line against the insurance carrier to recover any dividend which might be paid to Foust from its assets, thereby showing that nothing about a deductible clause was in the mind of the court, nor presented either in argument or in the record, as of course it was not.

The Circuit Court then made this proposition to Foust:

> "If Foust is willing to stipulate not to use any judgment he may recover in the state action as a claim against the estate there could be no objection to allowing the action to proceed to judgment * * *. But if such stipulation is not filed by the appellant within three days, supplemental briefs shall be filed within ten days thereafter relating to the propriety of the exercise of the judicial discretion of the District Court, whereupon we shall determine whether the stay ought to stand in the absolute form in which it was granted."

For opinion in full see,

In re Munson S. S. Line, 80 Fed. (2) 859

Foust was thus presented with an awkward problem to solve. He could have his jury trial if he would stipulate not to file any claim based upon any judgment which he might obtain against the Debtor's estate, but he had three good and sufficient reasons for not so stipulating, and he set them forth in a supplemental brief as follows:

1. Foust was granted only limited letters of administration which restricted his authority to the mere prosecution of the action. He had no right to enter into such a stipulation.

2. Under the policy the Munson Line was self-insurer for the first $2,500.00 of any claim and, as the value of the Foust claim would probably not exceed $5,000.00, such

stipulation would mean that Foust would have to abandon a substantial part of his claim.

3 Under the terms of the policy the insurer became subrogated to all rights of insured and, if Foust should waive his right to collect *pro tanto* from the debtor, then such waiver might operate to entirely release the insurer.

There in that supplemental brief was the *first mention* of the $2,500.00 deductible. It was simply stated as a possible reason for not stipulating to file no claim against debtor based on any judgment obtained. It was no part of the record as made. It was not before Judge Coxe. It was not known to the Circuit Court of Appeals when it handed down its "deferring decision".

It was a statement *dehors* the record. It was made because we did know that in another case such a policy which was issued to Munson Line did have that deductible clause, and it was merely assumed that the present policy was similar in its conditions and terms. Neither Foust nor his attorney had ever seen the policy.

As a matter of fact we had always believed that the deductible provision of the policy was void as contrary to Section 109 of the Insurance Law, and we argued that proposition before the New York Court of Appeals last fall.

The "deferring decision" of the Circuit Court of Appeals was handed down on January 6, 1936. It was two days later, to wit, on January 8, 1936, that the Court of Appeals handed down its decision holding the deductible clause to be valid.

Sawyer v. *Am. Ins. Co.*, 269 N. Y. 148.

It was not until that decision was rendered that we knew that the deductible of $2,500.00 was a claim against Munson Steamship Line, and it was in that newly acquired knowledge that the deductible was assigned as one

of the reasons for not stipulating to waive any claim against the debtor.

We were somewhat surprised, therefore, when the Circuit Court of Appeals seized upon that deductible clause as a justification for the refusal of Judge Coxe to modify the restraining order when the existence of such a clause had never been brought to Judge Coxe's attention, and no mention was made of it in the opposition papers and affidavits on behalf of the Trustees. Such a reason was not assigned by Judge Coxe to justify his refusal to let the tort case proceed to trial and the decision of the Circuit Court has placed a fact into the record which was not there when Judge Coxe heard and passed upon the motion; was not there when leave to appeal was asked; was not there when the briefs were prepared nor when the case was argued. It was not there when the court, in its "deferring opinion" on January 6th, 1936, said (R., 50):

> "Now the condition of liability of the insurance company under the policy will only be fulfilled if a judgment is recovered by the claimant and an execution thereon is returned unsatisfied. It is somewhat doubtful whether an order of the bankruptcy court allowing Foust's claim would be the equivalent of the execution required by section 109 of the Insurance Law, for an execution never issues out of that court, at least in a literal sense. But, even if an order of the bankruptcy court allowing the claim could be said to be the equivalent of an execution, the question would arise whether Foust, after receiving from the Munson Steamship Line whatever dividend might be paid him under the plan of reorganization, would be able to recover the balance of his claim from the carrier to the extent that such balance, plus what he had received as a dividend, did not exceed the face of the policy. This would depend on whether the words 'returned unsatisfied' in section 109 not only means 'wholly' but also 'partially unsatisfied'. The latter meaning of 'unsatisfied' would subject the carrier to two actions, one by the insured Munson Line to recover

> the dividend paid and the other by Foust for any balance not in excess of the policy. It may be argued with some, though not altogether convincing, force that such twofold causes of action are not authorized by section 109. It would probably simplify matters to allow the action in the state court to proceed. If Foust should recover judgment in that action, the execution would be returned 'unsatisfied,' and he then could proceed to collect his whole claim from the carrier by direct suit pursuant to section 109."
>
> *In re Munson S. S. Line*, 80 Fed. (2d), at page 861.

The above language is a clear indication that the idea of a deductible clause was not then in the mind of the court.

Nevertheless, when Foust refused to abandon any claim against the debtor as the price for obtaining the right to a trial, which refusal was based upon good and sufficient legal reasons, the Circuit Court of Appeals denied him the permission to try his case in quest of a judgment which was a condition precedent to proceeding against the insurance carrier, and approved and affirmed Judge Coxe's refusal to modify the stay.

Specification of Errors.

1. Section 77B did not change the existing law that a tort claim or a tort judgment, obtained after adjudication, was not provable and not dischargeable, and, therefore, any action pending at the date of the adjudication or approval was entitled to proceed to trial, and to become liquidated by judgment, and the Circuit Court of Appeals erred in denying this tort action a jury trial whether or not the judgment, when obtained, would be provable or dischargeable.

2. The court erred in requiring the claimant, Foust, to stipulate that no claim based upon any judgment which

he might obtain if allowed to proceed to trial, would be used as the basis of any claim against the assets of the debtor in reorganization, because the insurance stood as a guaranty to Foust as a donee beneficiary under the policy, and once obtaining a judgment against the insured, he could then sue directly on the policy.

3. Because of the existence of the insurance policy, and by force of Section 109 of the New York Insurance Law, Foust had a right to proceed to obtain a judgment so that he could have it returned unsatisfied because of the insolvency of the judgment-debtor, and thereby put himself in a position to sue on the policy and collect from the insurance carrier, and it was a denial of due process of law to have deprived this tort claimant of so substantial a right as the collection of his judgment as authorized by the Insurance Law.

4. Assuming that the Foust claim is provable in bankruptcy, nevertheless the court should have allowed the claim to be reduced to judgment so that direct suit could be brought against the insurance company because, irrespective of Section 109 of the Insurance Law, Foust would, under the common law, be considered a donee beneficiary under the liability policy and the insurance carrier would be considered as a guarantor to Foust, and direct suit may be brought against the insurer. The restraining order in the reorganization proceedings should have been modified to allow this.

5. Whether or not the policy contains a deductible clause of $2,500.00 which is the personal liability of the debtor, is immaterial at this time. The provisions of the policy were never before either the district court or the Circuit Court of Appeals, and was brought to their attention only after the court had decided the questions presented in the record, and the Circuit Court erred in using

such deductible clause as a reason for justifying Judge Coxe in refusing to modify the restraining order because the decision should have been predicated *only upon the record as made.*

6. Foust, as administrator of a deceased seaman, suing under the Jones Act, had a legal right to a jury trial, and his suit should not have been stayed.

7. Seamen, by virtue of the Jones Act which gave them all rights of railroad employees, inherit the benefits to railroad employees given them under the Railroad Reorganization Act.

POINT ONE.

Section 77B did not change the old law under Section 63 of the Bankruptcy Act to the effect that tort judgments obtained after adjudication are not provable, and the prosecution of the pending action should not have been restrained.

Two things are quite clear. In the first place, under Section 63 of the Bankruptcy Act, tort judgments obtained *after* adjudication were not provable or dischargeable in bankruptcy.

Schall v. *Camors,* 251 U. S. 239.

In the second place, in equity receiverships prior to 77B, it was the recognized law that claims could be liquidated by trial if a mere personal judgment was sought.

> "There is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which controls the *res.* It is only necessary that in the receivership proof of claim be made in an orderly

way so that it may be established who the creditors are and the amounts due them."

Reihl v. *Margolis*, 279 U. S., at page 224;
Langnes v. *Green*, 282 U. S. 531;
Chi. Title Co. v. *Fox Theatres*, 69 Fed. (2d) 60 (4);
Barton v. *Barbour*, 104 U. S. 126.

If the state court suit merely seeks judgment *in personam* and will not affect the property taken under the federal receivership, the two proceedings may go on concurrently.

Hatch v. *Holding Co.*, 19 Fed. (2d) 766; affirmed *Reihle* v. *Margolis*, 279 U. S. 218;
Kline v. *Burke Const. Co.*, 260 U. S. 226.

And if further citation be needed to establish the principle, we cite the recent expression of this court:

"Moreover, the bankruptcy court might, in the exercise of its discretion, conclude that it is desirable to have the litigation proceed in the state court."

Ex parte Baldwin, 291 U. S. 610.

Not only was this the law but it was the established practice, certainly in the Federal courts in New York, to vacate restraining orders in receiverships to permit tort claims to be tried at common law or in admiralty.

The *Matter of Wendell P. Colton Co.* v. *N. Y. & Cuba Mail Steamship Co.*, in the United States District Court for the Southern District of New York, was an equity receivership. Its index number is E-28236. In that case the customary general restraining order against the commencement or prosecution of suits was granted when the petition was filed. In that case numerous claimants, holding unliquidated claims for property damage, personal

injuries and other claims arising *ex delicto,* applied to the Court for a modification of the restraining order so as to permit suits to be brought or prosecuted so that judgments could be obtained. The record on file in the clerk's office discloses that numerous modifications were granted and actions were permitted to be prosecuted to judgment as well as granting authority to *"file libels in rem and to attach the vessel and to prosecute said suits to judgment and execution, if necessary."* That was not an instance where one judge granted all these orders of modification but, from time to time, they were granted by Judge Knox, Judge Winslow and Judge Goddard.

In the recent receivership of the Eighth and Ninth Avenue Railway Company, in the Southern District of New York, Index No. E 41,271, orders allowing pending tort actions to be prosecuted to judgment were frequently granted.

The practice of modifying restraining orders to allow tort actions to be tried had not been departed from in that district until Judge Coxe refused to modify his order in this Munson Steamship Line reorganization.

What changes, if any, were made in either the old law or the old practice by the Corporate Reorganization Act?

Since subdivision k of Section 77B (11 U. S. C. A. 207 k) expressly provides that Section 63 of the Bankruptcy Act is not applicable under 77B, we may eliminate Section 63 from consideration and look solely to 77B for any change in the prevailing equity practice of allowing trials to judgment.

It is noteworthy that the Congress saw fit to amend Section 63 so as to provide that, should reorganization *fail,* and liquidation should proceed *in bankruptcy,* then the amount of any damages shall be a provable claim when *"evidenced by the judgment of a court of competent jurisdiction."* (Italics ours.)

Title 11 U. S. C. A., Section 103 (6½).

It was, therefore, contemplated that in *bankruptcy* the amount of any damages was to be ascertained by trial, thus showing that a court trial was not abhorrent to the law makers.

We find no specific mention of procedure to liquidate a tort claim in the Corporate Reorganization Act. True it is that the definition of "creditors" was broadened and the definition of "claim" was enlarged, but we challenge the conclusion that these added generalities were sufficient to work so radical a change in the established law.

In Section 77B, (b), (10), Congress undertook to define "creditors" and "claims" as used in the Act, and said:

> "The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or his property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act."

The language "claims of whatever character" is certainly sweeping and all-embracing and, without more, might be interpreted as including tort claims. But Congress immediately proceeded to limit the broad expansiveness of "claims of whatever character" by a definition of "claims" as follows:

> "The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character."

It is apparent that the *debts* in contemplation were those arising *ex contractu* or from commercial transactions, and the context shows that tort claims were not in the same class or *genera* of "debts, securities * * * or other interests of whatever character."

Furthermore, after including under "creditors" all holders of "claims of whatever character" the Congress

deemed it necessary to step beyond this wide generalization by adding *"including claims under executory contracts" thereby confirming the thought that civil, contractual obligations were intended.*

Had the Congress intended to make so radical a change in the extant law as to *include* the theretofore *excluded* tort claims, would not the Act have added after "including claims under executory contracts" some positive, emphatic expression like "and tort or other claims arising *ex delicto*?"

And in defining "claims" to include "debts, securities • • • " would not the lawmakers have expressly said something like "debts, *tort or negligence claims for injury or death*, securities, etc.," if there had been the purpose to depart from long established law and practice and include tort claims?

And in providing for a final decree discharging the debtor from all "debts and liabilities" the word "liabilities" in the context manifestly refers to such as arise from obligations of a civil nature rather than those of tortious origin. Even that one word "liabilities" is not sufficient upon which to predicate an intention to include tort claims without some clear language evidencing such intention. It cannot be done by implication or supposition. Decisions which have been law for many years, and the statute law, cannot be changed or amended or repealed by hint or generalities.

Seems like the Act studiously avoided the mention of tort claims in reorganization for under Clause 6½ of Section 63 of the Bankruptcy Act it was expressly provided that if reorganization fails them tort claims may be evidenced by "a judgment of a court of competent jurisdiction." Its silence about tort claims in reorganization proceedings while providing for them if reorganization fails and liquidation in bankruptcy ensues, would seem to indicate a resolve to leave the existing law and practice in equity receiverships unchanged.

"Evidently the words of the section were carefully chosen; and the express mention of contractual obligations naturally excludes those arising from a mere tort. Since claims founded upon an open account or upon a contract, express or implied, often require to be liquidated, some provision for procedure evidently was called for. Clause b fulfills this function, and would have to receive a strained interpretation in order that it should include claims arising purely *ex delicto*. Such claims might easily have been mentioned if intended to be included."

Schall v. *Camors*, 251 U. S. 251.

Evidently Congress did not trust the inclusiveness of its general definition of "creditors" or "claims" or "liabilities" when it came to future rents and expressly mentioned such claims as provable. Its failure to expressly name claims for personal injuries or death by wrongful act seemingly would indicate an intention not to make such claims provable. Congress evidently intended to let the old practice under equity receiverships stand.

We contend, therefore, that 77B has left tort claims to be reduced to judgment by trial, and that such judgment, obtained *after* approval of the petition, is not provable.

This conclusion is not without authority to support it:

"Assuming that the court should direct in some manner the liquidation of unliquidated claims, then there is no reason why the court should not follow the established practice of permitting same to be done in a state court. Particularly is this true where a suit has already been instituted and is now pending."

In re Missouri Gas & Electric Service Co., 11 Fed. Supp. 434.

"The claimant who insists upon his constitutional right to a jury trial would do well to reflect that while the court may not be empowered to deprive him of that right, it can control the time for the

presentation and allowance of claims and the application of the debtor's property thereto * * *. These considerations yield the view that, while a tort claimant may not be stayed from liquidating his claim in a state court action, expediency will ordinarily divert him from that course."

In re James Butler Grocery Co., 12 Fed. Supp. 853.

See:

Chicago T. & T. Co. v. *Fox*, 69 Fed. (2d) 60;
In re Sentinel Oil Co., 12 Fed. Supp. 294.

It would seem that Congress, if intending to radically change existing law and practice, would have been attentive to employ language and words which would be free from doubt.

The term "creditors" was thrice defined by Congress in its legislation for the relief of individual, corporate and railroad debtors.

As to the individual the definition was "all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this title".

Title 11, U. S. C. A., Section 202.

There Congress distrusted its general language "claims of whatever character" as covering all possible claims and expressly inserted "a claim for future rent", well knowing that under prior law such claims were ordinarily not provable.

As to railroads, after using the identical language of said Section 202 as to "claims of whatever character", made sure that "rents under an unexpired lease" be included by expressly mentioning such claims.

Title 11, U. S. C. A., Section 205 (b).

But the Corporate Reorganization Act (Sec. 77B) followed the above definition of creditors as to individuals and railroads but never expressly mentioned claims for future rent or rents under unexpired leases, but doubtless included them under "executory contracts".

If "claims of whatever character" was not embracing enough to include "future rents" or "rents under an unexpired lease" or "claims under executory contracts", why would such general phrase include tort judgments obtained after adjudication? We contend that it does not.

POINT TWO.

The court erred in requiring Foust, as a condition precedent to obtaining the right to a trial, to stipulate that no part of any judgment obtained would be used as the basis of any claim against the debtor's estate.

The cause of action for indemnity for death of the decedent is a mere contingent claim. Upon trial there may be no recovery. As a cause of action it is too uncertain to form a basis of any claim. Only liquidation to a sum certain can give it the character of a claim.

Nor does the liability insurance policy naming Munson Steamship Line as the insured, nor the Insurance Law of New York, place Foust in the position of a secured creditor. He is not protected at all by the policy under the Insurance Law until judgment is obtained and the execution returned unsatisfied because of insolvency, and since there is no security upon property or assets of the debtor, nor upon its personal obligation of indemnity, Foust is not a secured creditor.

In re Fay Stocking Co., 10 Fed. Supp. 968 (2).

Foust, therefore, if he obtains a judgment, would then have a claim, and if such tort judgment be provable, he

had a legal right to file for such amount as was not recovered from the insurer, and if he failed to recover anything from insurer, then to file for full amount of the judgment.

Ivanhoe B. & L. Assn. v. *Orr*, 295 U. S. 243.

In the brief submitted by the debtor to this court in opposition to the Petition for Certiorari it was said at bottom of page 3:

> "Section 109 of the Insurance Law of the State of New York applies only to policies issued in the State of New York, and whether as applied to marine insurance policies it is constitutional, presents a serious question."

If that insurance law be held unconstitutional as to marine coverage then Foust would have no protection under that law and then his only chance to recover anything, except as a donee beneficiary, would be against the judgment-debtor, the Munson Steamship Line, in reorganization, and he was justified in not surrendering this right.

The court went beyond its power in attempting to make Foust waive and abandon all claim against the debtor as the price of being allowed to liquidate his claim.

POINT THREE.

The Insurance Law of New York wrote into the liability policy carried by Munson Steamship Line the provision that in the event a judgment for tort was obtained against Munson Steamship Line and returned unsatisfied because of the insolvency or bankruptcy of the insured, then the judgment-tort-creditor could recover on the policy in a direct action against the insurance company. The Circuit Court refused to lift the ban of the restraining order so that Foust could seek a judgment and thereby qualify to sue on the policy, and this was error.

Whatever may be the position generally of a mere tort claimant under Section 77B, and whether such claim or judgment be provable in reorganization, there exists a potential source of payment from the liability insurance policy which was carried by the Munson Steamship Line by complying with the New York Insurance Law requirements, to wit, obtain a judgment and have the execution thereon returned unsatisfied because of insolvency of the insured and thereupon the judgment-tort-creditor may bring suit against the insurance company. Any payment obtained from the insurance company would not diminish any of the assets of the debtor nor would the debtor have any expense of the trial.

Since the action was pending at the time the proceedings under 77B were had no good and sufficient legal reason exists to deprive this plaintiff of a common law trial and force him to chance an inadequate award from some referee who, perhaps, may be quite illiberal as to the quantum of damages or who might, because of prior training and associations, be sub-consciously prejudiced against negligence actions.

The common law action is being defended by the insurance company under its policy contract with the Munson Line. However, if the claim is heard by a referee the attorneys for the trustees in reorganization will defend and naturally will then claim fees for the extra services. Considering the number of these tort claims in suit these fees would amount to a substantial sum. Why should the bankrupt estate be charged with such fees when the insurance company is obligated to defend and is actually defending the actions?

If it be desired to conserve a bankrupt's assets for the creditors we emphasize here that large counsel fees and the expenses of trial could be saved this estate by permitting the actions to proceed regularly to trial in open court and let the insurance company bear its legitimate burden.

Why should the Munson Line, having previously protected itself against the costs, expenses and risks of trial by carrying liability insurance, assume as an insolvent debtor an obligation and burden which it would not have had to assume as a solvent insured?

Why pull the insurance company's chestnuts out of the fire at the risk of singeing its own financial fingers?

There is no reason for the trustees to diminish the estate by paying counsel fees, costs and expenses of producing the witnesses in court, stenographic fees, etc., to the detriment of general creditors when the insurance company has already been paid to defend the action at its own risk and expense.

This insurance policy is valuable to the tort claimant and may be his only possible means of collecting anything on his claim. It is a substantial property right. It is like good collateral. It is a guaranty of payment. The obtaining of the judgment cannot in any way impede, hinder or embarrass the orderly progress of the reorganization proceedings and if judgment is obtained and any effort should be made to levy it on any of the debtor's as-

sets, an injunction would properly issue to stop it. Such a levy, however, is most unlikely because the existing restraining order enjoins all sheriffs and marshalls from levying any execution on debtor's assets.

We contend that to deny such tort claimant the mere privilege and opportunity to obtain a judgment with the view to subjecting the insurance policy to the provisions of the said Insurance Law is to deny him due process of law in the protection of a valuable property right.

POINT FOUR.

Independently of Section 109 of the Insurance Law, Foust, under the general law of contracts, would be considered a donee beneficiary, for whose benefit the policy was issued and he may sue the insurer upon obtaining judgment against the Munson Steamship Line.

The respondent hints that the insurance law of New York, as it may affect maritime coverage, may be unconstitutional. If we should assume that Section 109 of the Insurance Law was non-existent, still, *under the general law* Foust would be regarded as a *donee beneficiary under that liability policy,* even though not named therein, *and he would have the right to reduce his claim to judgment and then recover on the policy,* NOT UNDER SECTION 109, but as *donee beneficiary,* or the person for whose benefit the policy was issued.

Hendrick v. *Lindsay,* 93 U. S. 143;
Austin v. *Seligman,* 18 Fed. 519-522;
Lawrence v. *Fox,* 20 N. Y. 208;
Rose v. *Zurich Ins. Co.,* 296 Pa. 206;
Graham v. *U. S. F. & G. Co.,* 308 Pa. 534;
39 Yale Law Journal 601.

See Annotations, 81 A. L. R. 1279 *et sequi.*

The insurance policy inures to the benefit of such judgment-tort-creditor because, under the law, the insurer is a guarantor, and a judgment-tort-creditor may pursue his remedy directly against the guarantor notwithstanding the reorganization proceedings.

Hill v. *Harding*, 130 U. S. 699;
Miller v. *Collins*, 40 S. W. (2d) 1062.

It would be proper practice to permit the action to proceed to judgment as a condition precedent to eventually fixing the liability under the policy, and if necessary to grant stay of execution against the assets of the debtor.

Manufacturers Finance Corp. v. *Vye-Neill Co.*, 62 Fed. (2d) 625; Cert. denied 289 U. S. 738;
Wexler v. *Davis*, 286 Mass. 142.

So that even without the benefit of the insurance law of New York, this tort claimant would be regarded as the intended beneficiary of the liability policy and, once armed with a judgment, he could sue directly on the policy. He had a common law right to fix his damages by judgment and to deprive him of that right was to deny him due process of law.

POINT FIVE.

The Circuit Court had no right to predicate its affirmance of Judge Coxe's refusal to modify the restraining order upon something not in the record.

If it be true that the policy contains a deductible clause whereby the debtor assumed the first $2,500.00 of liability, *that fact did not appear in the case when Judge Coxe refused to modify the restraining order* and *was not in the*

record on appeal considered by the Circuit Court of Appeals. It was casually mentioned *dehors* the record after the Circuit Court sought to impose terms on Foust as a condition for allowing a court trial.

The terms and conditions of the policy were never mentioned in any paper or pleading. The policy provisions were never before either the District Court or the Circuit Court of Appeals. All that the motion papers on record disclosed to either court was the bare fact that a liability policy was in existence.

Foust mentioned the $2,500 deductible *in explanation of his refusal to stipulate not to file any claim against the debtor's estate based on the judgment.*

We do not think that the Circuit Court should have put Foust in such an embarrassing position, or that he should be penalized by losing his insurance guaranty simply because he refused to enter into a stipulation deemed by him to be prejudicial and beyond his authority. He simply sought the legal right to subject that policy to the lien of his claim, and we submit that this legal question, raised on the record, should have been decided *on the record* and on its merits, divested of such *foreign considerations as deductible clauses* and *the possibility that a jury might award an excessive amount.* The court, under its rules, had no right to decide a question not passed upon by the court below.

Williams v. *Bank of America,* 55 Fed. (2d) 885 (12);
Strouse v. *Union Indemnity,* 67 Fed. (2d) 528 (8).

See:

Duignan v. *United States,* 274 U. S. 195.

That "jurors often return far larger verdicts in negligence actions than reason justifies" is no excuse for denying the valuable right of a jury trial to a seaman, particu-

larly where the presiding judge has the power to reduce verdicts, set them aside as excessive, or to grant new trials unless a reduction is voluntarily stipulated by plaintiff. If jurors are too generous, then Special Masters are often niggardly, particularly when the Special Master, by training and association, may be pro-defendant. The right to a jury trial is a very valuable right and is not lightly to be taken away.

POINT SIX.

Foust, as administrator of a deceased seaman, suing under the Jones Act, was entitled as a matter of right to a jury trial and should not have been denied that right.

The Jones Act (Title 46 U. S. C. A., Sec. 688) provides:

> "* * * and in case of death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law *with right of trial by jury*, and in such action all statutes of the United States *conferring or regulating the right of action for death in the case of railway employees shall be applicable.*" (Italics ours.)

In addition to the above provision of the Jones Act, the judicial code saves to suitors the right to a common law remedy.

Title 28 U. S. C. A., Sec. 41 (3).

It would require an emphatic and positive declaration by Congress in order to overthrow, not only the above provisions of law, but the custom and practice in respect of tort claims as so long established in equity receiverships.

It may be argued by the respondent that the inclusiveness of the language "all holders of claims of whatever

character" was intended to cover tort claims because it would be unlikely that Congress would legislate to divest a corporation of commercial and contract debts and liabilities only and have it emerge from reorganization confronted and burdened with numerous tort claims. On the contrary, we contend that Congress legislated advisedly in not disturbing the *status quo ante* of tort claims. The plight of the victims of such disasters at sea like those of the *Morro Castle* and *Vestris* was too well known to Congressmen to have them make it possible for a steamship company to defeat such tort claims, either by passenger or crew, by resort to reorganization. We cannot attribute to Congress any such intention in the absence of emphatic language in the Reorganization Act by which tort claims were included. If tort claims be included in debts and liabilities provable in reorganization, then a steamship company, faced with a major disaster and large claims arising therefrom, could effectually nullify the Jones Act and the Death on the High Seas Act by the simple expedient of reorganization. This would mean no jury trials; meager awards by Special Masters and all disputed questions of fact doubtless resolved in favor of the shipowner. We do not believe the language employed by Congress in defining "creditors" is sufficiently clear and positive to include tort claims, and thereby take away from seamen the favorable position which years of effort had given them under the Merchant Marine Act and its amendments.

Seamen are the wards of the court, and Congress has always been considerate of their rights as evidenced by the beneficent legislation in their behalf. We cannot impute to Congress an intention to take away from seamen the rights given them under the Jones Act without the use of such clear and positive language as to leave no doubt of the intention to deprive the seamen of jury trials.

Of course the right to restrain litigation is given the Court but a legal discretion must be used in exercising this power. Where there will be no interference with the

orderly procedure in reorganization, and claimants need a judgment or order to proceed against a third party, to restrain under such conditions is to be guilty of an arbitrary abuse of discretion.

The court committed an error in holding that the Reorganization Act took away this right.

POINT SEVEN.

Since the Jones Act placed seamen in the category of railroad employees, the provisions of the Railroad Reorganization Act forbidding stays of negligence suits and making tort judgments preferred claims, inure to the benefit of seamen.

Did Congress intend to discriminate between tort victims on steamships and those on railroads? Was the injured seaman to share the common fate of a merchandise creditor in corporate reorganization, while the injured railroad employee was given preferential consideration?

The Jones Act gave seamen all rights and remedies given to railroad employees under the Federal Employers' Liability Act, and amendments thereto. This court has held that the effect of the Jones Act was to place seamen in the same category as railroad employees.

> *Panama Railroad* v. *Johnson*, 264 U. S. 375;
> *Engel* v. *Davenport*, 271 U. S. 33.

If seamen are, in legal contemplation, regarded as railroad employees, why should they not come within the protection of the special consideration given railroad employees?

The Jones Act and the Employers' Liability Act are *in pari materia* and subsequent legislation affecting one will affect both.

Not only does the Railroad Reorganization Act provide that claims for personal injuries or death of an employee

"shall be preferred claims against the assets of such railroad corporation in receivership or in reorganization" (11 U. S. C. A. 205 N) but it further provides that actions for tort arising out of operations shall not be stayed, or if already stayed, the stay shall be vacated (11 U. S. C. A., Sec. 205 j).

If seamen, by virtue of the Jones Act, do not inherit the beneficent provisions of such law for railroad workers, then Congress has been guilty of most unjust discrimination between transportation employees, and if only railroad employees are protected in their tort claims, then Congress has, if 77B includes all tort claims, been guilty of a greater discrimination against the vast body of non-employee sufferers of injury or death by negligence.

If railroads have to pay tort claimants in reorganization why should steamship companies escape?

We are of the opinion that the said provisions in the Railroad Reorganization Act which prevents stay of common law actions for injuries or death of employees and which makes claims for injuries or death of employees preferred claims inure to the benefit of seamen. The Jones Act adopted the railroad law for the benefit of seamen—the railroad law then extant and any amendments thereto—and the above sections of the Railroad Reorganization Act, in effect, wrote those provisions into the railroad law, and consequently into the Jones Act.

It was contended that the provisions of the Judicial Code "saving to suitors in all cases the right to a common law remedy where the common law was competent to give it" could not be invoked under the Jones Act because it was passed subsequently to this saving clause. This contention was overruled. Said this Court:

> "The defendant insists that the saving clause refers only to rights recognized by the maritime law as existing in 1789, when the clause first was adopted, and therefore does not include rights

brought into the maritime law by subsequent legislative changes. We think the clause has a broader meaning, looks to the future as well as the past, and includes new as well as old rights, if only they are such as readily admit of assertion and enforcement in actions *in personam* according to the course of the common law. This is the view taken in *Steamboat Company* v. *Chase*, 16 Wall. 522, 523, 21 L. Ed. 369."

Panama Railroad v. *Vasquez*, 271 U. S. 557, 561.

The Federal Employers Liability Act and the Jones Act, which adopted and incorporated it, are *in pari materia* and should be construed together for the common benefit of all, and so much of the Railroad Reorganization Act as made tort claims exempt from stay and made tort claims preferred claims should apply to these two acts.

"All statutes *in pari materia* must be taken together and treated as having formed in the minds of the enacting body parts of a connected whole, though considered at different dates."

Rohrer v. *Hastings Brew. Co.*, 83 Neb. 112 (3).

"All statutes *in pari materia* are to be read together and construed together as if they formed part of the same statute, and were enacted at the same time."

Board of Commissioners v. *Aetna Ins. Co.*, 90 Fed. 222 (10).

"All acts on same subject, whenever passed, are what is termed *in pari materia*, are to be construed as if constituting one act and are to be so interpreted that all of them and all their clauses may be operative."

Scararigello v. *Pacione*, 70 Misc. (N. Y.) 211; *Elrod* v. *Moss*, 278 Fed. 124 (6).

"In cases of doubt or uncertainty acts *in pari materia* passed either before or after, and whether repealed or still in force, may be referred to in or-

der to discern the intent of the legislature in the use of particular terms or in the enactment of particular provisions."

Vane v. *Newcombe*, 132 U. S. 235;
Tiger v. *Western Inv.*, 221 U. S. 306.

So considered, the stay and preferential clauses of the reorganization act affect railroad employees under the Liability Act, and, in turn, affect seamen under the Jones Act. Therefore, another reason is presented to reverse the ruling of the Circuit Court.

"Adoption of an existing statute by an act of Legislature, which refers generally to the law relating to the subject, will include not only law in force at date of adopting act, but also such amendments of the law as are in force when action is taken or proceeding is resorted to under such law."

In re Argyle-Lake Bldg. Corp., 78 F. (2d) 491 (3).

"Generally, new enactments of fragmentary nature on subject covered by system of related general legislative provisions indicative of settled policy, should be fitted into existing system and given effect conformably thereto."

United States v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386 (1).

CONCLUSION.

The decision of the Circuit Court of Appeals for the Second Circuit should be reversed, with such direction as will vacate the stay and so modify the restraining order as to permit the Foust action to proceed expeditiously to trial.

Respectfully submitted,

SIMONE N. GAZAN,
Counsel for Petitioner.

FILE COPY

No. [redacted] 19

Office - Supreme Co
APR 18 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

BAXTER N. FOUST, Administrator, etc.,

Petitioner,

against

MUNSON STEAMSHIP LINE, Debtor in Reorganization,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

ARTHUR M. BOAL,
CHARLES J. FAY,
ALFRED N. HEUSTON,
Attorneys for Respondent.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

	PAGE
Opinion Below	1
Jurisdiction of the Court	1
The Questions Presented	2
Statement	2
ARGUMENT.	
The decision of the Circuit Court of Appeals was correct in all respects	4
POINT I.	
Personal injury tort claims are provable and dischargeable in reorganizations under Section 77-B	4
POINT II.	
The District Court was authorized to enjoin the petitioner's action at law	5
POINT III.	
There was no abuse of discretion on the part of the District Court in staying the petitioner's action at law	5
POINT IV.	
It is respectfully submitted that the petition should be denied	6

Authorities Cited.

	PAGE
Southern Pacific v. *Jensen*, 244 U. S. 205	6

Statutes.

Insurance Law:	
Section 109	3, 6
Bankruptcy Act:	
Section 77-B (U. S. Code, Title 11, Section 207)	2
(a)	3
(h)	3
(k)	3
(o)	3
Sub-section (b) (10)	4
Subdivision (h)	4
Subdivision (c)	5
Section 11 (U. S. Code, Annot., Sec. 29)	5

No. 877.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

BAXTER N. FOUST, Administrator, etc.,
Petitioner,

against

MUNSON STEAMSHIP LINE, Debtor in Reorganization,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Opinion Below.

The first opinion of the Circuit Court of Appeals (Rec. 78) is reported at 80 Fed. (2nd) 859. The second opinion is unreported (Rec. 84).

Jurisdiction of the Court.

The order of the Circuit Court of Appeals sought to be reviewed here, was entered on February 17, 1936. The petition for certiorari was filed on March 30, 1936.

The Questions Presented.

The questions presented are:

1. Is a personal injury tort claim provable and dischargeable in reorganization proceedings under the Corporate Reorganization Amendment of the Bankruptcy Act, known as Section 77-B (U. S. Code, Title 11, Section 207)?

2. May the District Court in reorganization proceedings stay actions at law for personal injuries against the debtor?

3. If the District Court had discretion to issue an injunction, did it abuse its discretion in doing so and in requiring the liquidation of the claim, as in the case of other similar claims, before a Special Master?

Statement.

The order approving the debtor Munson Steamship Lines' petition for reorganization and enjoining the prosecution of all pending suits was dated June 13, 1934 (Rec. 20, 27, 28). The petitioner moved to vacate the injunction so as to permit him to prosecute the action at law to final judgment. That motion was denied with leave to have his claim referred to a Special Master. The petitioner then moved in the Circuit Court of Appeals for leave to appeal to that Court. That Court stated in its opinion (Rec. 63):

> "Leave to appeal will be granted not because the appellant may have a right to trial by jury of his claim against the company upon its reorganization, but because we are in doubt whether the cause will

be discharged by the final order in the reorganization proceedings; Sec. 77-B (h), (k) and (o). If it will not be, it may be that the Court should not stay the action at all; Sec. 11 (a).

"The briefs and argument will not, therefore, touch the right of trial by jury of the claim in reorganization as to which leave is denied; it will be confined to whether the action can be stayed at all."

The Clerk in entering the order did not restrict it in accordance with the opinion, but merely marked the motion granted (Rec. 64).

The Circuit Court of Appeals in its first opinion held that tort personal injury claims are provable and dischargeable in reorganization proceedings and that the District Court had power to enjoin their prosecution, and then asked for further briefs on the question of whether there had been any abuse of discretion in refusing a jury trial, and after receiving further briefs, the Court held that there was no abuse of discretion and affirmed the order.

The respondents contended in the District Court and the Circuit Court of Appeals that the question of insurance was irrelevant and immaterial. All the information concerning insurance was contained in affidavits of the petitioner's counsel and in his briefs. From these it does not appear whether the alleged policy was issued in the State of New York or not. Section 109 of the Insurance Law of the State of New York applies only to policies issued in the State of New York, and whether as applied to marine insurance policies it is constitutional presents a serious question. There is nothing in the record as to the terms of the alleged policy of insurance, except that the petitioner stated in his brief in the Circuit Court of Appeals that his

claim was worth $5,000, and that the policy contained a $2,500 deductible. In other words, his claim was fifty percent insured and fifty percent uninsured. This statement was accepted by the Circuit Court of Appeals as correct.

ARGUMENT.

The decision of the Circuit Court of Appeals was correct in all respects.

POINT I.

Personal injury tort claims are provable and dischargeable in reorganizations under Section 77-B.

The term "creditor" is defined in Sub-section (b) (10):

> "The term 'creditor' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this title."

And in dealing with the final reorganization decree, it is provided (Subdivision (h)):

> "* * * Such final decree shall discharge the debtor from its debts and liabilities. * * *"

A practical plan of reorganization could not be worked out which would leave the debtor subject to suit by tort creditors immediately upon resumption of business after reorganization, and it is clearly intended to provide for the proof and discharge of all claims and liabilities, whether contract or tort.

POINT II.

The District Court was authorized to enjoin the petitioner's action at law.

Subdivision (c) (10) (U. S. Code, Title 11, Sec. 207 (c) (10)) provides that the District Court

> "in addition to the provisions of section 29 of this title (Sec. 11 of the original Bankruptcy Act) for the staying of pending suits against the debtor, may enjoin or stay the commencement or continuation of suits against the debtor until after final decree." (Parenthesis ours).

This gives the Reorganization Court greater powers to stay proceedings than is imposed by the Bankruptcy Court and covers the petitioner's action. The Circuit Court of Appeals also held that if a claim was provable and dischargeable in reorganization, there was also power to enjoin it under Section 11 of the original Bankruptcy Act (U. S. Code, Annot., Sec. 29).

POINT III.

There was no abuse of discretion on the part of the District Court in staying the petitioner's action at law.

The District Court had a right to determine the method for liquidating claims in reorganization proceedings. He wished a more speedy determination by a Special Master than the ordinary proceedings in an action at law, so he could have all claims liquidated within a specified period of time because, until this was done, no plan of reorganization could be approved. Trials of seamen's action at law place a heavy burden upon the Trustees who must have wit-

nesses present in court, whereas in proceedings before a Special Master their testimony could be taken as they were available at great saving. The District Court was correct in adopting a plan which would enable the Trustees to make such a saving.

The questions of insurance referred to in the petitioner's brief at great length have no relevancy here. If the debtor carried insurance covering this liability, among others, the nature and extent of that insurance would not come into consideration until after the debtor's liability had been established in the reorganization proceedings.

Section 109 of the Insurance Law of the State of New York applies only to policies issued in that State and there is nothing to show that this alleged policy referred to here was issued in New York. The tort occurred on board the debtor's vessel on navigable waters of the State of Maine. It is doubtful whether Section 109, as construed to apply to the policy in question, is constitutional in view of the decisions of this Court in *Southern Pacific* v. *Jensen*, 244 U. S. 205, because it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in the international and interstate relations."

POINT IV.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

ARTHUR M. BOAL,
CHARLES J. FAY,
ALFRED N. HEUSTON,
Attorneys for Respondent.

Dated: New York, April 17, 1936.

FILE COPY

Office - Supreme Court,
FILED
OCT 12 1936
CHARLES ELMORE CRO
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 19.

BAXTER N. FOUST, Administrator, etc.,
Petitioner,

against

MUNSON STEAMSHIP LINE, Debtor in Reorganization,
Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

ARTHUR M. BOAL,
CHARLES J. FAY,
ALFRED N. HEUSTON,
Attorneys for Respondent.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

	PAGE
OPINIONS	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
SUMMARY OF ARGUMENT	6
ARGUMENT	8
POINT I.—Tort claims are provable and dischargeable in reorganization proceedings under 77B	8
POINT II.—The District Court was authorized to enjoin the continuation of the petitioner's suit	11
POINT III.—The petitioner is not entitled to a jury trial as a matter of right	16
POINT IV.—There was no abuse of discretion on the part of the District Court in staying the petitioner's common law action and requiring the liquidation of his claim before a special master	20
The Insurance Question	22
CONCLUSION:	
POINT V.—It is respectfully submitted that the judgment of the Circuit Court of Appeals, affirming the order of the District Court, should be affirmed	24

Cases Cited.

	PAGE
Chelentis v. *Luckenbach Steamship Co.*, 247 U. S. 372	24
Continental Ill. Nat. B. & T. Co. v. *Chicago, Rock Island & Pacific Co.*, 79 L. Ed. 642, 653	14, 16
Ex Parte Green, 286 U. S. 437	7, 17, 21
Insurance Co. v. *Dunham*, 11 Wall. 1	23
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149	24
Langnes v. *Green*, 282 U. S. 531	7, 17, 21
Matter of Empire State Bank, 18 N. Y. 199, 210	7, 18, 21
North German Fire Ins. Co. v. *Adams*, 142 Fed. 439	23
Sands v. *Kimbark*, 27 N. Y. 147	7
Southern Pacific Co. v. *Jensen*, 244 U. S. 205	24
The Minnie R., 49 Fed. (2d) 121	23

Statutes.

Insurance Law of the State of New York:	
Sec. 109	3, 5, 22, 23
Bankruptcy Act:	
Section 77B (U. S. Code, Title 11, Sec. 207)	2, 6, 8
(a)	12
(b)	8
(b) (10)	6, 9
(c) (8)	10
(c) (10)	6, 11
(c) (11)	6
(h)	4, 9
(k)	4, 10
(o)	4
Section 11, U. S. Code, Annot. Sec. 29 (a)	4, 12
Title 28, U. S. C. A., Sec. 379	13
Title 46, U. S. C. A., Sec. 688	19

Authorities.

Brooklyn Law Review (Vol. IV., pp. 237-238, 288)	13, 14, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 19.

BAXTER N. FOUST, Administrator, etc.,
Petitioner,

against

MUNSON STEAMSHIP LINE, Debtor in Reorganization,
Respondent.

BRIEF IN BEHALF OF RESPONDENT.

Opinions.

The first opinion of the Circuit Court of Appeals (R. 47) is reported 80 Fed. (2d) 859 and the opinion on rehearing (R. 53) is reported 82 Fed. (2d) 289. The District Court wrote no opinion.

Jurisdiction.

The order of the Circuit Court of Appeals affirming the order of the District Court was entered on February 17, 1936 (R. 54). The petition for certiorari was filed March 30, 1936, and was granted on April 27, 1936 (R. 55).

Questions Presented.

1. Is a personal injury tort claim provable and dischargeable in reorganization under the Corporate Reorganization Amendment of the Bankruptcy Act, known as 77-B (U. S. Code, Title 11, Sec. 207)?

2. Has the District Court jurisdiction in reorganization proceedings to stay actions at law for personal injuries and death against the debtor?

3. Did the District Court abuse its discretion in requiring tort personal injury and death claims to be liquidated before a Special Master?

Statement.

The Debtor, Munson Steamship Line, filed a petition in the District Court in which it set forth its assets, its indebtedness, the fact that a suit was pending against it for the appointment of a receiver, and that it was apprehensive that other creditors would bring suit, attach its property and cripple it in the conduct of its business; that its property, assets and business as a going concern at a fair valuation exceeded its indebtedness, but that (R. 12)

> "Sixth. That the debtor is unable to meet its debts as they mature and that it desires to effect a plan of reorganization pursuant to Section 77B of Chapter VIII of the Acts of Congress relating to bankrutcy."

The District Court entered an order on June 13, 1934 (R. 13):

> "1. That said petition be and it hereby is approved as properly filed under Section 77B of Chapter VIII of the Acts of Congress relating to bankruptcy.
>
> "2. That the debtor is unable to meet its debts as they mature."

and further provided (R. 18) that all persons

> "be and they hereby are enjoined and restrained * * * from instituting or prosecuting or continuing the prosecution of any action at law or action or proceeding in equity or admiralty or bankruptcy against the debtor or the trustees in any court of law or equity or admiralty or bankruptcy * * *."

On January 25th, 1935 the petitioner gave notice of motion to be made on January 30th to vacate the order, to permit him

> "to prosecute his claim against the Munson Steamship Line to a final award and/or final awards against Edward P. Farley, Esq., and Morton L. Fearey, Esq., trustees for Munson Steamship Line * * * *". (R. 20).

In a supporting affidavit petitioner's attorneys stated that petitioner was entitled to a jury trial as a matter of right, and further urged that the Munson Steamship Line was covered by liability insurance.

> "Deponent further states that if the Court permits this administrator to perfect his claim to a final award, he will then bring suit under Section 109 of the Insurance Law of the State of New York for satisfaction of the award, if any" (R. 22).

In an affidavit in opposition thereto Alfred N. Heuston stated that the Court had already denied three similar petitions in other causes made by the attorneys for the petitioner here and that questions of law raised by said petition were dealt with in those cases, and asked that the motion to vacate the stay be denied (R. 23). The papers in the other cases are not in the record. The alleged policy of liability insurance is not in the record. The Court entered an order on March 20th, 1935, denying the motion to vacate the stay (R. 25-26) with leave to the petitioner to go before a Special Master.

The petitioner asked leave to appeal to the Circuit Court of Appeals. In allowing the appeal that Court stated (R. 37):

> "Leave to appeal will be granted not because the appellant may have a right to trial by a jury of his claim against the company upon its reorganization, but because we are in doubt whether the cause will be discharged by the final order in the reorganization proceedings; Sec. 77-B (h), (k) and (o). If it will not be, it may be that the court should not stay the action at all; Sec. 11 (a).
>
> "The briefs and argument will not, therefore, touch the right of trial by jury of the claim in reorganization as to which leave is denied; it will be confined to whether the action can be stayed at all".

The record was made up and briefs submitted on the basis of the questions outlined by the Circuit Court of Appeals in its memorandum. The Circuit Court of Appeals handed down its first opinion on January 6, 1936, in which it held that the claim was both provable and dischargeable in the reorganization proceedings and the Court was authorized by the Act to issue the injunction, and then proceeded

to consider matters beyond the scope of its memorandum which had not been briefed or argued, namely: the application of the Insurance Law of the State of New York to liability insurance policies, and stated (R. 51-52):

> "The appeal should not be finally determined without giving the parties a chance to present their views as to whether the District Court ought not to allow the state court action to proceed to judgment. There would be no occasion to do this if the appellant Foust is willing to stipulate not to use any judgment recovered in his favor as a claim against the debtor's estate. But, if such a stipulation is not filed by the appellant within three days, supplemental briefs shall be filed within ten days thereafter relating to the propriety of the exercise of judicial discretion of the District Court, whereupon we shall determine whether the stay ought to stand in the absolute form in which it was granted".

If the stipulation had been filed by the petitioner as outlined in the opinion, the Debtor and the Trustees would have applied for a rehearing, but the petitioner declined to so stipulate. The Court in its further opinion, (R. 53) stated:

> "One of the reasons he gives for not so stipulating is that the liability policy contains a deductible clause whereby the insured Munson Steamship Line became self-insurer for the first $2,500 of the claim and 'as the value of the Foust claim is not over $5,000 such stipulation would mean that the administrator would relinquish a substantial part of his claim.' "

and stated (R. 53):

> "* * * As the estate of the debtor had a substantial interest in the amount of the recovery, the

judge in charge of the section 77B (11 U. S. C. A. §207) proceeding did not abuse his discretion in promoting that interest and in adopting the mode of liquidating the claim which he selected. That mode was more convenient and expeditious than any other and was plainly an advantage to the estate * * *".

Summary of Argument.

The petitioner's claim is both provable and dischargeable in the 77B reorganization proceeding. The amendment defines "creditors" to include "all holders of claims of whatever character against the debtor" and the term "claims" includes "debts, securities, other than stock, liens, or other interests of whatever character [Subdivision (b)(10)]. These definitions are sufficiently broad to include the petitioner's claim. The decree approving the plan of reorganization shall "discharge the debtor from its debts and liabilities" [Subdivision (h)]. The petitioner's claim is certainly a liability of the debtor.

The District Court was given power to enjoin the continuation of the petitioner's suit [Subdivision (c)(10)] and was given power to "refer any matters to a special master * * * for consideration and report, either generally or upon specified issues" [Subdivision (c)(11)], and the District Court during the pendency of the reorganization proceedings shall "have exclusive jurisdiction of the debtor and its property wherever located". The District Court had discretionary power to stay the petitioner's action at law and refer his claim to a special master.

The question of any liability insurance that the debtor might have is not relevant or material to the determination of the debtor's liability. There is no policy in the record.

There are only general statements concerning it, except one made in the Circuit Court of Appeals that the deductible was $2,500 and that this was half of the estimated value of the petitioner's claim.

The petitioner was not entitled to a jury trial as a matter of right. In proceedings for limitation of liability claims of seamen under the Jones Act, such as the petitioner's here, are liquidated in the Admiralty Court without a jury trial. *Langnes* v. *Green,* 282 U. S. 531; *Ex Parte Green,* 286 U. S. 437 (same case). It was the practice of Courts of Equity before the adoption of the Constitution to handle insolvent estates and to liquidate claims against those estates before referees or masters without juries. *Matter of Empire State Bank,* 18 N. Y. 199, 210; *Sands* v. *Kimbark,* 27 N. Y. 147.

The District Court exercised sound discretion in having all claims against the debtor's estate liquidated before a special master. This saved the trustees expense, avoided delay and insured uniformity of treatment of all claimants or creditors.

ARGUMENT.

The judgment of the Circuit Court of Appeals should be affirmed.

POINT I.

Tort claims are provable and dischargeable in reorganization proceedings under 77B.

One of the purposes of Congress in enacting the Corporate Reorganization Amendment of the Bankruptcy Act, known as 77B (11 U. S. Code, 207) was to permit corporations which were in financial difficulties to readjust their obligations and continue as going concerns so that those values which attach to a going business and which are lost through liquidation might be preserved for the benefit of those interested in the corporation. It would be extremely difficult, if not impossible, to reorganize a corporation and have it continue its business with one class of creditors free to attack the assets as soon as it was reorganized and the other class or classes barred from doing so. Congress intended that all those having claims against or interest in the corporation should be parties to the proceedings, should have their rights adjusted and should be bound by the final decree. The Amendment provides (11 U. S. Code, 207):

> "(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either

through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character or otherwise. * * *''

and then defines the terms ''creditors'' and ''stockholders'':

''(10) * * * The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this title. The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character. * * *''

Then in dealing with a plan of reorganization:

''(h) * * * Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. *Such final decree shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid.* * * *'' (Italics ours.)

The definitions of the term ''creditors'' and ''claims'' are including and not excluding definitions. The term ''creditors'' includes ''all holders of claims of whatever character against the debtor or its property''. Claims are not limited to debts. This is shown by the definition of claims, which

> "includes debts, securities, other than stock, liens, or other interests of whatever character."

The petitioner has no interest in the debtor's property but he has a claim *in personam* against the debtor, and therefore an interest in its affairs.

Congress did not adopt for the purposes of reorganization the definitions of "claims" and "creditors" used in the Bankruptcy Act itself and did not intend to apply the test of the claims that might be proved and that might be discharged in cases of liquidation to cases of reorganization. It set new standards and new tests.

Congress provided in Subdivision (c)(8) that if a plan of reorganization is not proposed or accepted, or if proposed and accepted is not confirmed, the District Judge may order and direct the estate to be liquidated, and in case of such liquidation, provided in Subdivision (k):

> "claims which are provable under section 103 of this title may be proved as provided in Section 93, * * *"

and then states:

> "* * * None of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j), and (m) of section 93 of this title, and subdivisions (a) and (e) of section 110 of this title, shall apply to proceedings instituted under this section unless and until an order has been entered directing the trustee or trustees to liquidate the estate. * * *"

It was the intention of Congress to make the terms "creditors" and "claims" broader under the amendment than they had been under the Bankruptcy Act. This is shown by the sections referred to above, by the general

purposes of the amendment and by the provision that the final decree

> "shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid."

The term "liabilities" is not defined in the Act, but should be broad enough to include any claim which might ripen into a judgment for the payment of money. It was the intent of Congress to adjust every obligation and every liability of the debtor and every interest in the debtor and its property in the plan of reorganization and to provide that after the final decree was entered confirming and approving the plan of reorganization, no one should have any rights against the debtor or its property, except as set forth in that plan. It is difficult to see how corporations could otherwise be successfully reorganized.

POINT II.

The District Court was authorized to enjoin the continuation of the petitioner's suit.

The District Court was granted broad powers. Subdivision (c)(10) provides:

> "(10) in addition to the provisions of section 29 of this title for the staying of pending suits against the debtor, may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continu-

ance of any judicial proceeding to enforce any lien upon the estate until after final decree; and (11) may refer any matters to a special master, who may be one of the referees in bankruptcy, for consideration and report, either generally or upon specified issues, * * *."

It is provided in (a):

"* * * the court in which such order approving the petition or answer is entered shall, during the pendency of the proceedings under this section, have exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section, and shall have and may exercise all the powers, not inconsistent with this section, which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature * * *".

Section 11 (a) of the Bankruptcy Act (U. S. Code, Title 11, Section 29 (a)) provides:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or a dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined".

Under Section 29 (a) the staying of a suit founded on a provable claim is mandatory. Under the Amendment Congress gave the District Court discretion to stay the com-

mencement or continuance of any judicial proceeding, and also gave it

> "exclusive jurisdiction of the debtor and its property wherever located"

for reorganization purposes. The giving to the District Court of exclusive jurisdiction over the debtor in and of itself is enough to exclude the other courts from jurisdiction and prevent their continuing suits pending at the time of the commencement of the reorganization proceedings.

In speaking of this provision, Mr. John Gerdes (Vol. IV., Brooklyn Law Review, 288) states:

> "In proceedings under Section 77B, the court, after the approval of the petition, is expressly vested with 'exclusive jurisdiction of the debtor • • • wherever located'. The 'exclusive jurisdiction' of one court prevents all other courts from determining controversies relating to the object of such jurisdiction. It would seem, consequently, that no other court would have any jurisdiction whatever over the debtor, once the petition had been approved".

The power to stay proceedings and the exclusive jurisdiction over the debtor and its property show an intent on the part of Congress that the Reorganization Court shall settle all controversies involved in the reorganization, including the liquidation of claims against the debtor. This is quite different from an equity receivership where the court has exclusive jurisdiction over the property of the debtor, but by virtue of the provisions of Section 265 of the Judicial Code (28 U. S. Code, Annot. 379) the district court's power to stay proceedings in any state court is limited to those authorized by law relating to proceedings in bankruptcy.

In this connection, Mr. John Gerdes (Vol. IV., Brooklyn Law Review, 237-238) states:

> "Effective reorganization calls for a single agency, with complete and paramount jurisdiction over the debtor and its property, to administer the assets while the proceedings are pending and to determine all claims involving the debtor estate. Such centralization occurs in part in bankruptcy, where the trustee gets title to all the debtor's property from the date of adjudication. Section 77B employs the same device in reorganization proceedings to secure unity of control over the debtor and its entire property".

In dealing with the Railroad Reorganization Amendment (Sec. 77) this Court said in *Continental Ill. Nat. B. & T. Co.* vs. *Chicago, Rock Island & Pacific Co.*, 79 L. Ed. 642, 653:

> "Section 77 advances another step in the direction of liberalizing the law on the subject of bankruptcies. Railway corporations had been definitely excluded from the operation of the law in (June 25), 1910 (chap. 412, §4, 36 Stat. at L. 838, 839, U. S. C. title 11, §22), probably because such corporations could not be liquidated in the ordinary way or by a distribution of assets. A railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities cannot be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had be-

> come 'insolvent or unable to meet its debts as they mature.'
>
> "Equity receiverships, resorted to for that purpose have never been satisfactory for many reasons. Partly, no doubt, in recognition of that situation, Congress, by §77, added railroad corporations to the category of those who might have relief by legislation passed in virtue of the bankruptcy clause of the Constitution; and determined after consideration, that such relief to be effectual should take the form of a reorganization, and should extend to cases where the corporation is 'unable to meet its debts as they mature.' The last phrase, since it is used as an alternative for the word 'insolvent,' obviously means something less than a condition of 'bankruptcy' or 'insolvency' as those words are employed in the law."

In that case the District Court had enjoined the sale of collateral, which consisted of bonds of the debtor and its subsidiaries which had been given to secure bonds and notes. The Court's authority to enjoin the sale of such securities was challenged. There was no provision in Section 77 expressly giving that authority. The basis of the District Court's decision, as stated by this Court, was:

> "That under paragraph 15 of §2 of the Bankruptcy Act, the Court had power to make such orders, issue such process, and enter such judgments as might be necessary for the enforcement of the Act; and that it was necessary for the enforcement of Section 77 that the holders of the collateral be enjoined and restrained from selling or disposing of the same pending the preparation and consummation of a reorganization plan."

and in dealing with this question this Court said:

> "It may be that in an ordinary bankruptcy proceeding the issue of an injunction in the circumstances here presented would not be sustained. As to that it is not necessary to express an opinion. But a proceeding under §77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile."

The Corporate Reorganization Amendment was passed by Congress after the decision of the District Court and prior to the decision of the Circuit Court of Appeals in the *Rock Island* case. It is significant that Congress then gave the district court the power which it had exercised in the *Rock Island* case, and in addition gave it exclusive jurisdiction over the debtor—another indication of the intention of Congress to enable the district court to decide every controversy involved in the reorganization, including the liquidation of claims.

POINT III.

The petitioner is not entitled to a jury trial as a matter of right.

A Court of Admiralty in proceedings for limitation of shipowners' liability liquidates all claims without jury trials.

In *Langnes* v. *Green*, 282 U. S. 531, 75 Law. Ed. 520, this Court said in referring to an injunction issued by an Admiralty Court in liquidation proceedings against the prosecution of a suit in a State Court for personal injuries under the Jones Act at pages 539-540:

> "The situation, then, is that one Statute gave respondent the right to a common-law remedy, which he properly sought in the State Court, and another Statute gave the petitioner the right to seek a limitation of liability in the Federal District Court. Needless to say that if the case for a limitation of liability assumes such a form that only a Federal Court is competent to afford relief, the jurisdiction of that Court is exclusive and must be exerted to dispose of the entire cause; and the action in the State Court may not be further prosecuted."

When this case was before this Court a second time (*Ex parte Green*, 286 U. S. 437, 76 Law. Ed. 1212) this Court stated at page 440 (Law. Ed. 1214):

> "Notwithstanding the foregoing, Green, following the remission of the cause to the State Court, put in issue the right of the owner to limited liability, by challenging the seaworthiness of the vessel and the lack of the owner's privity or knowledge. The matter was properly brought before the Federal District Court, and that Court held that the question of the owner's right to limited liability having been raised, the cause became cognizable only in admiralty, and that its further prosecution in the State Court should be enjoined. In this the District Court was right and the motion for leave to file a petition for writ of mandamus must be denied."

Prior to the adoption of the Bankruptcy Act, and even prior to the adoption of the Constitution, the Courts of Equity ordinarily administered insolvent estates and disposed of the controversies involved, including the liquidation of claims.

In *Matter of Empire State Bank,* 18 N. Y. 199, 210, Chief Justice Denio said:

> "* * * The winding up and settling of the affairs of insolvent corporations fell within the jurisdiction of Courts of Equity from the nature of the case, the forms used in Courts of Law not being adapted to such controversies; and we accordingly find that it was the constant practice of the Court of Chancery to entertain suits for that purpose and by its decree to determine who were stockholders and contributors, and in what proportions they were to contribute, and to cause an account to be taken of the unsatisfied debts and liabilities, and to decree a distribution accordingly."

And in *Sands* v. *Kimbark,* 27 N. Y. 147, in a concurring opinion, he said:

> "But long before the adoption of the Constitution a practice had grown up of winding up and settling the affairs of insolvent estates and insolvent corporations, and of estates in the hands of trustees, by suits in equity; and another practice had, under legislative authority, prevailed to a considerable extent, of settling such estates by subjecting the demands in favor of or against them to adjudication by Referees appointed by mutual consent, or if such consent could not be obtained, by the appointment of such Referees on the application of one of the parties to a Court or Judge."

The petitioner relies upon the provisions of the amendment of the Bankruptcy Act providing for the reorganization of railway corporations, known as Section 77, Title 11, U. S. Code Sec. 205. It provided in Subdivision (j) that suits or claims for damages caused by the operation of trains, buses or other means of transportation, may be filed or prosecuted to judgment in any Court of competent jurisdiction and any order staying the prosecution of any such cause of action, upon appeal shall be vacated. This amendment applies only to railroad corporations. The proceedings for the reorganization of the Debtor, Munson Steamship Line, are under Section 77B. It is not reorganized as a railway corporation, and the provisions above referred to have no application to it.

It is further contended that Section 33 of the Merchant Marine Act of 1920, Title 46, U. S. Code, Annot., Sec. 688, extends to seamen all the statutes regulating the right of action for injuries or death in case of railway employees. This statute incorporated into maritime law the then existing provisions of the Employers Liability Act pertaining to causes of action for injury or death of railway employees and did not incorporate future acts. It did not incorporate into the maritime law statutes dealing with the reorganization of railway corporations. If Congress had intended Section 77 to apply to water transportation companies, it would have said so. If it had meant the amendment of Section 77 prohibiting the staying of actions for personal injuries to apply to steamship corporations as well as railway corporations, it would have said so.

It is submitted that the petitioner is not entitled to a trial by jury as a matter of right.

POINT IV.

There was no abuse of discretion on the part of the District Court in staying the petitioner's common law action and requiring the liquidation of his claim before a special master.

Congress gave the District Court in 77B exclusive jurisdiction over the debtor and its property [Subdivision (a)], gave it power to stay the commencement or continuation of any judicial proceedings [Subdivision (c) (10)], and provided that the District Court [Subdivision (c) (11)]:

> "may refer any matters to a special master, who may be one of the referees in bankruptcy, for consideration and report, either generally or upon specified issues • • •".

In discussing these provisions, Mr. John Gerdes (Vol. IV., Brooklyn Law Review, 237-238) states:

> "Effective reorganization calls for a single agency, with complete and paramount jurisdiction over the debtor and its property, to administer the assets while the proceedings are pending and to determine all claims involving the debtor estate. Such centralization occurs in part in bankruptcy, where the trustee gets title to all the debtor's property from the date of adjudication. Section 77B employs the same device in reorganization proceedings to secure unity of control over the debtor and its entire property."

and in discussing the exclusive jurisdiction given by the Amendment over the debtor and its property, stated (p. 288):

> "In proceedings under Section 77B, the court, after the approval of the petition, is expressly vested with 'exclusive jurisdiction of the debtor • • • wherever located'. The 'exclusive jurisdiction' of one court prevents all other courts from determining controversies relating to the object of such jurisdiction. It would seem, consequently, that no other court would have any jurisdiction whatever over the debtor, once the petition had been approved".

The reorganization of the debtor involves many difficult questions. The purpose of the reorganization is to permit the debtor to continue as a going concern and to preserve those values which would be lost by liquidation. The District Court had every reason for desiring to have all claims against the debtor settled in the reorganization proceedings. The advantage of this was that they would all be measured by a common yardstick and they would be liquidated more promptly by a special master than by various other courts acting independently. Furthermore the Trustees would be put to great expense and the estate of the Debtor to a great burden in defending actions in various state courts. As the Debtor was a shipowner operating vessels, it had to consider the difficulty of having witnesses present in different common law courts against the advantage of being able to produce them more conveniently before a special master. The procedure adopted by the District Court of having multitudinous claims liquidated before a special master is similar to the procedure of Courts of Admiralty in proceedings for limitation of shipowners' liability. *Langnes* v. *Green*, 282 U. S. 531, 75 Law Ed. 520; *Ex Parte Green*, 286 U. S. 437, 76 Law Ed. 1212; *Matter of Empire State Bank*, 18 N. Y. 199, 210; *Sands* v. *Kimbark*, 27 N. Y. 147.

The Insurance Question.

Petitioner bases his claim of abuse of discretion upon the question of insurance. He stated in his moving papers in the District Court that the Debtor had liability insurance. The nature of that insurance, where the policy was issued and the amount of the deductible, if any, were not set forth. Whether they were set forth in the other cases in which counsel who now represent the petitioner represented the moving parties does not appear. Unless the policy were issued in the State of New York, Section 109 of the Insurance Law of the State of New York, referred to in the petitioner's brief, has no application. These matters were not included in the record on appeal because the memorandum allowing that appeal restricted the argument to the question of the power of the District Court to enter the decree enjoining the prosecution of the common law action, and to that question it was not relevant or material. After the case had been argued the Circuit Court of Appeals handed down its first opinion, indicating that it was considering the question of the exercise of the District Court's discretion in view of the statements concerning insurance. Then the petitioner stated to that Court that the policy had a deductible of $2,500; that his claim was not worth over $5,000, and that therefore not more than 50% covered by insurance. The petitioner tried on reargument in the Circuit Court of Appeals, and is trying here, to determine questions of insurance liability prior to the determination of the liability of the debtor, and that without the insurance policy or any of the factors for the determination of insurance liability before the Court. The statements in the record and in the briefs concerning insur-

ance are mere conclusions of law, except as to the deductible of $2,500.

Under his Point Four, on page 22, the petitioner argues that he as a *donee beneficiary* under the policy has a direct right against the insurance company under it, regardless of the provisions of Section 109 of the Insurance Law of the State of New York, and in support of that proposition cites cases dealing with rights against a surety. That question is not in any way raised by anything in the record.

Whatever insurance policies the Debtor may have are its property. The District Court by virtue of its exclusive jurisdiction over the Debtor and its property can, when all the facts are before it, determine and adjust the rights and liabilities of all the parties and see that whatever rights the petitioner may have against the Debtor, or an insurance company which issued a policy to the Debtor, are properly safeguarded and protected; in other words, it can do complete justice to all parties.

Section 109 of the Insurance Law of the State of New York, as applied to marine insurance policies, is an unconstitutional interference with the uniformity of the admiralty and maritime law. This policy, so far as anything is indicated by the record, covers a marine tort. Such policies are maritime contracts. *Insurance Co.* v. *Dunham,* 11 Wall. 1; *North German Fire Ins. Co.* v. *Adams,* 142 Fed. 439; *The Minnie R.,* 49 Fed. (2d) 121.

The effect of Section 109 as applied to policies of marine insurance is to give a policy issued in the State of New York one effect and another policy issued in the State of New Jersey a different effect. A seaman injured in New York would have one right against the shipowner if it had a policy of insurance issued in the State of New York and

another right if it had a policy issued in New Jersey or some other state. This destroys the uniformity of the maritime law, which was held essential in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Chelentis* v. *Luckenbach Steamship Co.*, 247 U. S. 372.

There is nothing in the record on which to base any claim of abuse of discretion on the part of the District Judge in requiring the liquidation of the petitioner's claim and of all other similar claims before a Special Master.

POINT V.

Conclusion.

It is respectfully submitted that the judgment of the Circuit Court of Appeals, affirming the order of the District Court, should be affirmed.

Respectfully submitted,

ARTHUR M. BOAL,
CHARLES J. FAY,
ALFRED N. HEUSTON,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 19.—October Term, 1936.

Baxter N. Foust, Administrator, etc., Petitioner, *vs.* Munson Steamship Lines, Debtor in Reorganization.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 9, 1936.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner is the administrator of the estate of Coy E. Foust and, February 1, 1934, commenced an action at law under § 33 of the Merchant Marine Act of 1920[1] in the United States court for the southern district of New York against the Munson Steamship Lines. His complaint alleges that, February 27, 1930, while deceased was at work for defendant as seaman on its steamship Mundelta, his death was caused by defendant's negligence and, for the benefit of petitioner as surviving father, prays damages in the sum of $15,000. Defendant's answer denies the negligence charged against it and alleges decedent's death was caused by risks assumed and his own negligence.

June 11, 1934, defendant filed its petition for reorganization under § 77 B of the Bankruptcy Act.[2] The petition did not refer to the administrator's claim or to the action brought for its enforcement. Two days after it was filed, the court entered a decree that approved the petition as properly filed, declared the debtor unable to meet its debts as they mature, determined it required relief under § 77 B, appointed trustees to take and operate

[1] " . . . in case of the death of any seaman as a result of any . . . personal injury [suffered in the course of his employment] the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury. . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located". 46 U. S. C., § 688. Panama R. R. Co. *v.* Johnson, 264 U. S. 375, 391. Lindgren *v.* United States, 281 U. S. 38, 40.

[2] Added by § 1, Act of June 7, 1934, 48 Stat. 911, 11 U. S. C., § 207.

its property and, inter alia, enjoined the institution or prosecution of any action at law against the debtor.

January 26, 1935, petitioner applied for leave to prosecute his suit and supported his application by an affidavit of his attorney suggesting: The debtor is covered by liability insurance; if petitioner gets judgment, he will sue insurer to enforce its liability under § 109 of the Insurance Law of New York;[a] the stay is unjust to the surviving father, gives no advantage to the debtor and benefits only the insurer. The affidavit asserts that plaintiff is entitled to a jury trial and that prosecution of his action at law should not be stayed. The trustees by affidavit of one of their attorneys opposed petitioner's application but did not say that the debtor is not protected by insurance. The court denied petitioner's motion and ordered that a special master be appointed to report on the claim. Petitioner applied to the Circuit Court of Appeals for leave to appeal. After hearing the parties, it filed an opinion announcing that appeal would be granted but that the argument would be confined to the question whether the action can be stayed. Later the court entered an order unqualifiedly allowing the appeal. *Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160, 165.

After argument, limited as suggested, the court in its first opinion on the appeal held petitioner's claim provable and dischargeable and the district court empowered to stay prosecution of the suit. 80 F. (2d) 859. Then there remained for consideration the question—which had not been argued—whether in the exertion of that power the district court abused its discretion. The court suggested that, if petitioner would stipulate not to use as a claim against the estate any judgment he might recover, there could be no objection to allowing his action to proceed. It held the appeal should not be finally determined without giving the parties a chance to present their views as to whether the district court ought not to allow the action to proceed and directed that, if petitioner failed to file such a stipulation within a specified time, supplemental briefs would be

[a] "No policy of insurance against loss or damage resulting from accident to or injury suffered by an employee . . . shall be issued or delivered in this state . . . unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier . . . and stating that in case execution against the insured is returned unsatisfied . . . because of such insolvency or bankruptcy, then an action may be maintained by the injured person, or his or her personal representative," against the insurer for the amount of the judgment not exceeding the amount of the policy.

received relating to the propriety of the exercise of the judicial discretion of the district court. Petitioner having declined so to stipulate, the parties submitted their briefs. In his, petitioner stated that under the insurance policy the first $2,500 of petitioner's claim would be borne by the insured; that the value of the claim was not over $5,000 and that such stipulation would mean that the administrator would relinquish a substantial part of his claim. Upon consideration of the additional briefs the court in its second opinion on the appeal held that the district court had not abused discretion, and affirmed the order. 82 F. (2d) 289.

As a reason in support of the stay, the first opinion states that jurors often return far larger verdicts in negligence cases than reason justifies, and that the trustees have a right to take that fact into account and not to accede to a method for the liquidation of tort claims that is unusual in bankruptcy unless the ordinary method of proof before a special master would imperil the claimant's rights. In its second opinion the court adopted and emphasized the fact stated in appellant's supplemental brief to the effect that the policy covered not over one-half the value of petitioner's claim. It decided that, as the debtor's estate had a substantial interest in the amount of the recovery, the district judge did not abuse his discretion. The court said: "That mode was more convenient and expeditious than any other and was plainly an advantage to the estate". It added: "If the claim had been fully covered by the insurance so that the carrier was primarily liable for the entire damage, we might have reached a different conclusion; but, under the circumstances, we think the determination of the court below was justified", and affirmed the order appealed from.

The Circuit Court of Appeals rightly held petitioner's claim provable and dischargeable and the district judge empowered to stay proceedings in the suit.

Section 77 B gives to the district judge power, to be exerted in accordance with its provisions, to alter the rights of creditors or any class of them. Subdivision (b) (10) declares the term "creditors" shall include, for all the purposes of the section, the holders of claims of whatever character and whether or not they would otherwise constitute provable claims under the Bankruptcy Act; that the term "claims" includes debts, securities, other than stock, liens, or other interests of whatever character. Subdivision (h)

directs that the final decree shall discharge the debtor from its debts and liabilities. Subdivision (c) (8) provides that, if a plan is not proposed or accepted or if proposed and accepted but not confirmed, the court may direct the estate to be liquidated. Subdivision (k) (4), upon order for liquidation, authorizes to be proved as provided in § 57 claims provable under § 63,[4] but declares that none of the sections mentioned in subd. (k) except subds. (g), (i), (j) and (m) of § 57[5] and subds. a and e of §70[6] shall apply in proceedings under § 77 B unless and until an order has been made directing liquidation of the estate. Mere reading of pertinent parts of the above-mentioned provisions makes it plain that "creditors" and "claims" as used in proceedings under § 77 B are more comprehensive than in the Act before the addition of that section. See *American Surety Co.* v. *Marotta,* 287 U. S. 513, 517. Undoubtedly "creditors", "claims" and "liabilities" to be dealt with in the reorganization proceeding include petitioner, the cause of action he asserts and the judgment he seeks to recover.

Section 77 B (c) (10), enlarging power conferred by § 11,[7] broadly declares the judge "may enjoin or stay the commencement or continuation of suits against the debtor until after final decree". The exclusive jurisdiction given the court over the debtor and his property, subd. (a), does not imply that the commencement or the carrying on of suits against the debtor must be enjoined or that all claims must be referred to a master for consideration and report. Subd. (c) (11). See *In re Prudence Bonds Corporation,* 75 F. (2d) 262, 263. The power to stay does not imply that it is to be, or appropriately may be, exerted without regard to the facts. The granting or withholding of injunction is left to the discretion of the court.

Was the denial of petitioner's application for leave to prosecute his action at law an abuse of discretion?

The record contains no opinion or statement of the district judge to disclose the grounds on which he rested his denial. In

[4] 11 U. S. C., § 103.

[5] These subdivisions relate to claims: (g) of creditors who have received preferences; (i) secured by individual undertaking of another; (j) based on debts owing the United States, a State, etc., as a penalty or forfeiture, and (m) of any estate being administered in bankruptcy. 11 U. S. C., § 93.

[6] These declare: *a.* That the trustee succeeds to the bankrupt's title as of date of adjudication; and *e.* may avoid any transfer which any creditor of bankrupt might have avoided. 11 U. S. C., § 110.

[7] 11 U. S. C., § 29.

reorganization proceedings neither the Act nor any rule of law entitles debtors or trustees as a matter of right to enjoin the trial of actions such as that brought by petitioner. The court is to exercise the power conferred by subd. (c) (10) according to the particular circumstances of the case and is to be guided by considerations that under the law make for the ascertainment of what is just to the claimants, the debtor and the estate. *Osborn* v. *U. S. Bank,* 9 Wheat. 738, 866. The *Styria, Scopinich, Claimant* v. *Morgan,* 186 U. S. 1, 9. *Langnes* v. *Green,* 282 U. S. 531, 541. *Burns* v. *United States,* 287 U. S. 216, 222-223. By § 33 of the Merchant Marine Act, under which the petitioner sued, Congress ordained that upon claims for personal injuries or death suffered in the course of their employment seamen or their personal representatives may maintain actions at law for damages with the right of trial by jury. The reorganization proceedings are not inherently inconsistent with jury trial for the liquidation of such claims. Unless satisfactorily shown that prosecution of petitioner's action would embarrass the administration of the debtor's estate, the district court should have granted leave.

There is no support for the stay in the suggestion of the Circuit Court of Appeals to the effect that in negligence cases juries often give verdicts larger than reason justifies. It is to be remembered that if without support in the evidence or contrary to the law they may be set aside. *C. M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 478. *Gunning* v. *Cooley,* 281 U. S. 90. *Minneapolis, etc. Ry.* v. *Moquin,* 283 U. S. 520, 521. It must be assumed that the court by appropriate exertion of their power will adequately safeguard against verdicts shown to be arbitrary and unjust. While § 33 of the Merchant Marine Act remains in force courts may not assume that claims there specified cannot be justly liquidated by jury trial. Even if shown generally to attend jury trials, the suggested danger would not warrant denial of petitioner's application. We have recently said: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care". *Dimick* v. *Schiedt,* 293 U. S. 474, 486.

The record does not sustain the statement that the mode of liquidation ordered is an advantage to the estate. On the contrary, the petitioner's verified application for leave to appeal

states that the attorney for debtor in the action at law "represents the insurance carrier and consequently the defense of this case will impose no burden whatsoever, either financial or otherwise, upon the trustees herein or their counsel". That statement has not been denied; nor has it been suggested by the debtor or trustees that the insurer is not bound under the policy at its own expense to defend the suit.

Respondent suggests that the record fails to show that the policy was issued in New York and insists that, unless it was, the insurance may not be taken into account in determining whether the district court abused its discretion. The point is without merit. The affidavit submitted by petitioner states in substance that the debtor is protected by liability insurance and that any judgment recovered by petitioner on his claim will have to be paid by the insurer; that if allowed to establish his claim by jury trial petitioner will then sue insurer under § 109 of the New York Insurance Law for the amount, if any, awarded to him and that the only party benefiting by the delay is the insurance company. It is true that the affidavit does not directly state that the policy is governed by § 109 or that it contains the provisions required by that section, but the affidavit is sufficient adequately to suggest that petitioner claimed that insurer's liability to the debtor is in accordance with the provisions of that section. The debtor and trustees had notice of his application for release from the stay; the trustees appeared to oppose it. They failed to produce the policy or to disclose any of its provisions or whether it was issued in New York.

The injunction was a comprehensive one plainly broad enough to cover petitioner's claim; it was entered without disclosure of the existence of that claim or the pending suit and before petitioner had opportunity to be heard on the propriety of making it apply to him. On his application for leave to bring his suit to trial petitioner was seeking to remove the stay; and under the circumstances the position of debtor and trustees opposing him and insisting that the restraint be continued was not substantially unlike that of suitors for injunction; the issue was whether liquidation of his claim in that manner would unjustly affect the estate. The facts bearing on that question were known to, or within the control of, the debtor and trustees. They had, and readily could submit to the court, definite evidence in respect of the insurance.

Their failure to bring it forward tends strongly to discredit their opposition to petitioner's motion. The circumstances warrant the inference that the facts are not more favorable to respondent than those indicated by the affidavit as the grounds on which the petitioner sought release from the stay, and that, if disclosed, the policy or other evidence as to the insurance would not tend to support injunction against petitioner. *Runkle* v. *Burnham,* 153 U. S. 216, 225. *Kirby* v. *Tallmadge,* 160 U. S. 379, 383. *Mammoth Oil Co.* v. *United States,* 275 U. S. 13, 52. The burden of frank disclosure was upon the debtor and trustees. *Keystone Co.* v. *Excavator Co.,* 290 U. S. 240, 244, *Cf.* 2 High on Injunctions, 4th ed., § 1474. In the absence of a showing of facts sufficient to require a finding that liquidation of petitioner's claim by jury trial would encumber the reorganization proceedings, the debtor and trustees were not entitled to have the injunction continued in force against petitioner. *Langnes* v. *Green,* 282 U. S. 531, 541.

The Circuit Court of Appeals dealt with the case according to the facts indicated in petitioner's supporting affidavit as modified by the statement taken from his supplemental brief to the effect that the policy did not cover the first $2,500 of the debtor's liability. Petitioner emphasizes the fact that the record does not show the modification and says that his statement as to the amount deductible was made in explanation of his refusal to stipulate that he would not file against the estate a claim based on the judgment, if any, obtained in the pending suit. 80 F. (2d) 861. He earnestly insists that the court erred in predicating its decision upon that statement. As in the view we take of the case the fact that debtor is only partially insured is not of controlling significance, we do not pass upon that assignment of error.

Assuming that the insurance did not extend to the first $2,500 and the value of petitioner's claim was not more than $5,000, we are of opinion that the order appealed from was an abuse of the discretion vested in the district court by § 77 B (c) (10). If petitioner's claim shall be established upon report of a master, grave doubts will arise as to the liability of the insurer to the petitioner. The case would not be within the words of § 109 of the New York Insurance Law. Attempt by petitioner to recover from insurer would encounter difficult questions of construction of a state statute as to which federal courts are not the final authority.

Morehead v. *Tipaldo*, 298 U. S. —. The imposition of that method of establishing petitioner's claim is liable to expose him to serious peril of substantial loss. On the other hand, if petitioner is permitted to liquidate his claim by jury trial and shall get judgment, and execution thereon shall be returned unsatisfied because of the debtor's insolvency, his case would appear to be plainly within the words and intent of § 109. That section applying, petitioner would be entitled to maintain an action against the insurer for the amount of his judgment but not exceeding the amount of insurer's liability to the debtor under the policy.

There is nothing in the record to warrant a finding that liquidation of petitioner's claim by trial of his pending action at law would hinder, burden, delay or be at all inconsistent with the pending corporate reorganization proceeding under § 77 B. Injunction against that method of establishing the debtor's liability, if any there is, ought not to stand.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.